Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Mary C. Overby and
James Overby,

Petitioners,

v.

Benjamin G. Witso,

Respondent.

On Petition For Writ Of Certiorari
To The Minnesota Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a man holding no presumption of paternity can gain standing to compel the the minor child to undergo blood or genetic testing to determine whether he is a presumed father of the minor child?

2. Whether a state can order blood or genetic testing of a minor child who is part of an intact family without first determining if such tests would be in the minor child's best interests.

3. Whether it is a deprivation of the Due Process Clause and/or the Equal Protection Clause under the 14th Amendment to the United States Constitution for a state to create new substantive rights for third parties at the expense of minor children in an intact family.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Mary C. Overby and
James Overby,

Petitioners,

v.

Benjamin G. Witso,

Respondent.

MARY C. OVERBY AND JAMES OVERBY RESPECTFULLY PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE MINNESOTA SUPREME COURT.

OPINIONS BELOW

1. Witso v. Overby, 627 N.W.2d 63 (Minn. 2001) petition for rehearing denied (Minn., August 16, 2001).

2. Witso v. Overby, 609 N.W.2d 618 (Minn. Ct. App. 2000).

JURISDICTION

The decision of the Supreme Court of Minnesota was entered June 7, 2001. A petition for rehearing was denied by the Supreme Court of Minnesota on August 16, 2001. This appeal is being served and filed within 90 days from the denial of the petition for rehearing. The jurisdiction of this Court is involved under 28

U.S.C. § 1257(a). The provisions of 28 U.S.C. § 2403(b) may be applicable.

CONSTITUTIONAL PROVISION AND STATUTES

Minnesota Statutes § 257.52-§257.60. (See Appendix.)

United States Constitution Amendment XIV. See Appendix.)

STATEMENT OF THE CASE

Respondent and petitioner Mary Overby had a single sexual encounter in July 1997. Petitioner Mary Overby also had on-going sexual relations during this same time period with her husband, petitioner James Overby. Petitioners were married at the possible time of conception and have remained married since. The minor child ("MRO") was born April 27, 1998.

Nearly a year after MRO's birth, respondent petitioned the district court to be adjudicated the father of MRO, born April 27, 1998. Respondent requested that blood or genetic testing be performed. Respondent sought standing under Minn. Stat. § 257.55, subd. 1(f), which is part of Minnesota's adoption of the Uniform Parentage Act. Petitioners moved to dismiss alleging respondent lacked standing pursuant to Minn. Stat. § 257.55 and § 257.57. Petitioners alleged respondent held no blood or genetic test results. Petitioner Mary Overby maintains that petitioner James Overby is MRO's biological father. Respondent has never seen MRO, held the child out as his own, or provided any support for MRO. In their memorandum to the district court, petitioners noted they expected federal questions of due process and equal protection to be advanced by respondent. Although petitioners argued that denial of standing to respondent was not a violation of due process or equal protection, respondent did not respond to or address the constitutional arguments in his pleadings before the district court.

A hearing was held in district court on August 11, 1999. The district court ruled that respondent had standing to compel blood or genetic testing. Thereafter, on August 27, 1999, the district court certified the following as an important and doubtful

question to the Minnesota Court of Appeals pursuant to Minn. R. Civ. App. P. 103.03:

> When the biological mother admits having had intercourse with the putative father during the period of possible conception of the child at issue, the putative father acts promptly to compel blood or genetic testing, and the child is yet so young that she will not be cognizant of the testing procedure, does the putative father have standing to compel the mother and child to submit to the tests (keeping in mind that the trial court has reserved jurisdiction to appoint a guardian ad litem depending on the test results and then determine whether it is in the child's best interests that the litigation continue)?

The Minnesota Court of Appeals recast the question as follows:

> Must a paternity action be dismissed for lack of standing when the petitioning putative father shows the requisite sexual contact but has not had genetic testing, which might establish the genetic basis for standing that arises from a positive genetic test?

In their brief to the Court of Appeals, petitioners noted the conflict among UPA states in addressing whether a putative father may have standing, but had not met any statutory criteria to achieve standing. The Court of Appeals answered this question in the negative and affirmed the district court. 609 N.W.2d 618 (Minn. Ct. App. 2000).

In June 2000 petitioners requested review by the Minnesota Supreme Court, arguing that respondent lacked standing, the Court of Appeals decision created new substantive rights at the expense of intact families, and substantive harm would be brought against the intact family. In their brief, petitioners noted that parenting and family units are important considerations, protected, at least in part by the Constitution. The Minnesota Supreme Court granted review on July 24, 2000.

On June 7, 2001, four justices of the Supreme Court of Minnesota affirmed the lower court's decision with three justices dissenting. 627 N.W.2d 63 (Minn. 2001). The dissent, citing this Court, noted the constitutionally protected issues of parenting and the family unit.

Petitioners petitioned for rehearing because in interpreting the statutes in favor of respondent, the Minnesota Supreme Court failed to consider the due process rights of the minor child, the fact that the minor child has never been a party to the action, and the constitutionally protected liberty interest of petitioners' family. On August 16, 2001, the Supreme Court of Minnesota denied the petition for rehearing.

ARGUMENT

I. THE QUESTION OF WHO CAN SEEK TO ESTABLISH A PARENT-CHILD RELATIONSHIP IS SUBSTANTIAL.

This case calls upon the Court to address the compelling question of who has standing to seek a parent-child relationship and how and under what circumstances. This case presents constitutional questions of the rights of intact families against those of third parties.

In this matter, the Minnesota Supreme Court determined that a man who had a sexual encounter with the mother of a child has standing to request blood or genetic testing. While focusing wholly on the rights of the alleged biological father, who could be

no more than a predatory rapist, the court ignored the rights of the intact family and that of the child herself.

II. THE MINNESOTA SUPREME COURT'S DECISION CONFLICTS WITH OTHER UPA STATES.

Minnesota has adopted the Uniform Parentage Act. Minnesota courts generally turn first to other UPA states in interpreting paternity statutes. Spaeth v. Warren, 478 N.W.2d 319, 323 (Minn. Ct. App. 1991). In interpreting a statute similar to another UPA state, the Minnesota Supreme Court came to a strikingly different conclusion, resulting in a conflict between UPA states on issues broaching the issues of due process and equal protection. This conflict is significant and worthy of review by this Court because it impacts the rights of the child as well as the constitutionally recognized importance of the family unit.

In reviewing state and United States Supreme Court case law, the Minnesota Supreme Court concluded

> that a party alleging he is a child's father has standing to bring a paternity action under section 257.57, subdivision 2 to compel blood or genetic testing as provided in section 257.62, subdivision 1 even though he does not at the time the action is commenced possess blood or genetic tests that establish he is the child's presumed father under section 257.55, subdivision 1(f). [Respondent] thus has standing to bring this paternity action.

A North Dakota case, B.H. v. K.D., 506 N.W.2d 368 (N.D. 1993), interprets a statute based on the UPA and applies it to a virtually identical fact pattern as that in this case. This case is significant not only due to the virtually identical fact pattern but because North Dakota, like Minnesota, is one of several UPA states

that have added a provision to their adoption of the UPA that a presumption of paternity is created by existing blood or genetic testing that show certain statistical results. Minn. Stat. § 257.55, subd. 1(f); N.D. Cent. Code § 14-17-04(1)(f).[1] In addition, both Minnesota and North Dakota vest standing to declare the existence or nonexistence of paternity in the same people. Minn. Stat. § 257.57; N.D. Cent. Code § 14-09-03. In B.H. v. K.D., the child's mother engaged in sexual relations with two men around the time of conception. The mother subsequently married one of the men, and the child was born into an existing marriage. The putative father brought a paternity action, alleging he was the child's biological father, and sought an order to compel blood tests.

The North Dakota Supreme Court held that the putative father lacked standing to challenge the paternity of a child born into an existing marriage. 506 N.W.2d at 373. The court concluded that because a biological father may not declare the nonexistence of a husband's paternity, an alleged biological father also lacks standing to compel blood tests. Id. The court concluded that because a biological father may not declare the nonexistence of a husband's paternity, an alleged biological father also lacks standing to compel blood tests. Id. The putative father argued that the blood tests he sought, if positive, would provide the requisite standing to rebut the presumption of paternity operating in favor of the mother's husband. Id. at 375. The court rejected this approach as an end-run around the plain language of the statute.

> One must have standing to *commence* an action – .... Therefore, in order for [the putative

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[1] Those states that have adopted a presumption of paternity based on blood or genetic testing include: Colorado, Colo. Rev. Stat. Ann. § 19-4-105(1)(f) (West Supp. 1993); Delaware, 13 Del. C. § 804; Kansas, K.S.A. 38-1114; Minnesota, Minn. Stat. § 257.55(1)(f) (1992); Missouri, V.A.M.S. § 210.822; Montana, MCA § 40-6-105; Nevada, NRS § 126.051; North Dakota, N.S. Cent. Code § 14-17-04(1)(f) (1991); Ohio, Ohio Rev. Code Ann. § 3111.03(A)(6) (Anderson Supp. 1992); Rhode Island, Gen. Laws 1956 § 15-8-3; and Washington, RCWA § 26.040.

> father] to have had standing as an "interested party" . . . it would have been necessary for the requisite test results to have been in existence when this action was commenced. They were not. One cannot commence an action without standing, based only on the hope that standing may later materialize. That is contrary to law and to the plain language and meaning of the statutes. There must be genetic tests already in existence which satisfy the statistical qualifications of the statute. Without the requisite test results, an individual like [the putative father] cannot bring such an intrusive action, disrupting an established family, hoping that tests ordered by the court will subsequently vest him with standing to proceed. Too much irreparable damage will have occurred to the family in the meantime; the potential for abuse is too great.

Id. (citations omitted).

Despite almost the same facts and statutes, the Minnesota Supreme Court disregarded the North Dakota case and relied on a Colorado case where a putative father requested and was granted genetic testing. In re S.R.H., 981 P.2d 199, 202 (Colo. Ct. App. 1998), rev'd on other grounds sub nom., N.A.H. v. S.L.S., 9 P.3d 354, 366 (Colo. 2000). The Minnesota Supreme Court noted that Colorado courts had concluded that "a putative father was denied his right to equal protection when he was prevented from proving his paternity through blood or genetic tests under the state's parentage act."

The Minnesota Supreme Court's decision is inapposite to this Court's decision in Michael H. v. Gerald D., 491 U.S. 110, 109. S. Ct. 2333, 105 L. Ed 2d 91 (1989). In that case, this Court upheld the constitutionality of denying biological fathers sanding to assert paternity when a marital presumption of paternity already exists. This Court, in examining a California statute establishing a conclusive presumption of paternity in the mother's husband, stated that the federal due process clause does not provide biological fathers with a protected liberty interest in asserting paternity.

Further conflict exists among UPA states without the statutory statistical probability presumption. Michael H. v. Gerald D., 491 U.S. 110, 109 S. Ct. 2333 (interpreting California law)[2]. See also J.K. v. R.S., 706 So.2d (Ala. 1997); and A v. X, Y, and Z, 641 P.2d 1222 (Wyo. 1982) concluding that alleged father lacks standing when a marital presumption exists. Other UPA states have considered a child's constitutional right to due process by requiring that a child's best interests be determined first before proceeding with a man's request for genetic testing. See M.F. v. N.H., 599 A.2d 1297, 1300-01 (N.J. App. Div. 1991); McDaniels v. Carlson, 738 P.2d 254, 261-62 (Wash. 1987).

This Court should hear this case because other state courts of last resort have entered decisions in conflict with one another in determining this important standing question that impacts all of the involved parties' rights of due process and equal protection.

III. THE LOWER COURTS IGNORED THE SUBSTANTIVE HARM TO AN INTACT FAMILY.

None of the three Minnesota courts that have heard this case have considered the substantive harm to MRO's intact family. No consideration was given to the emotional bonds developed

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[2] Michael H. involved a case where an unwed father had established a relationship with his natural child. Blood tests indicated a 98.07% probability that he was the natural father of a child born to the wife of another man. Michael H. challenged the constitutionality of a California statute on the ground that it infringed upon his due process rights to establish a relationship with the child.

between MRO and her father, petitioner James Overby, or to the legitimacy of the child being part of an intact family since birth. In Marriage of Ross, 245 Kan. 591, 601, 783 P.2d 331, 338 (1989), the Kansas Supreme Court observed that "once the judge in the interest of judicial economy, ruptures the father/child relationship, the judge cannot return the parties to the position they were in prior to the blood tests, no matter how wise or great his or her judicial power. That is a fact of life."

The United States Constitution provides heightened protection against government interference and has an interest in preserving the integrity of intact families. The Supreme Court of Minnesota's decision creates the potential for familial discord. Is it in a child's best interest to disrupt an intact family unit that the child has been part of since birth? A so-called biological claim should not alone justify unwrapping a parent-child relationship established within a family. A predatory rapist could make the same biological claim this respondent does. Recognition of standing to any man could invite actions by individuals whose "only purpose is to break up a family unit to satisfy a jealous or revengeful feeling." See A v. X, Y, and Z, 641 P.2d at 1225. Furthermore, once respondent holds genetic test results, he can simply walk away and come back another day to cause additional harm to an intact family.

The role of the marital presumption is the protection of the family. The strong presumption in favor of the legitimacy of a child is a matter of overriding social policy because it excludes inquiries into the child's paternity that would be destructive of family integrity and privacy. Michael H. v. Gerald D., 491 U.S. 110, 109 S. Ct. 2333 (1989). The plurality opinion found that an alleged father's interest in a relationship with the child did not rise to the level of a liberty interest because that relationship was not historically treated as a protected family unit, nor had this relationship been accorded special protection. On the contrary, they found that societal traditions had protected the marital family against claims such as Michael H.'s.[3] An order compelling blood

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[3] The U.S. Supreme Court recently reaffirmed that importance of decision-making by the family regarding the care of their children

or genetic testing affects the substantial rights of petitioners and their family. Parenting and the family unit are important considerations, protected, in part, by the United States Constitution. This Court has said: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." Michael H., 491 U.S. at 124, 109 S. Ct. at 2342 (quoting Moore v. East Cleveland, 431 U.S. 494, 503, 97 S. Ct. 1932, 1938, 52 L. Ed. 2d 531 (1977)).

If allowed to proceed, respondent's action has the capability to pierce the protected realm of the family unit and could destroy the very foundation of the family structure they have built. Respondent's action threatens the protected family unit, affecting petitioners' substantial rights. As the dissent of Minnesota Supreme Court noted:

> Any man with an affidavit claiming that he had sexual contact with the mother during the period of conception may, after today's opinion, intrude upon an established family unit.
>
> * * *
>
> Even if the mother admits the sexual contact, the majority's reading, taken to its logical conclusion, would give any man who raped the mother standing to obtain blood tests and therefore assert his paternity of the resulting child.

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without interference. See Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000). "The interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court."

This Court has already noted that "grave problems" exist with giving a rapist a liberty interest in establishing a father and child relationship. See Michael H., 491 U.S. at 124, n.4, 109 S. Ct. 2333. The constitutional protected issues regarding the sanctity of the family compel this Court to accept review.

IV. THE LOWER COURT IGNORED THE FAMILY'S AND CHILD'S DUE PROCESS AND EQUAL PROTECTION RIGHTS.

A child's rights to due process and equal protection are no less important than that of any third party including that of the man seeking to establish paternity. Proceeding with genetic testing without first determining if it is in the child's best interests clearly violates the child's, as well as the family's, constitutional rights to due process and equal protection. One cannot minimize the irreparable damage that could be caused by the Minnesota Supreme Court's rush to judgment by permitting genetic tests on behalf of respondent without first determining if it is in MRO's best interests.

What is and what is not in the child's best interests has not been addressed by any court in this matter. Petitioners note, however, that other courts have found that the mere filing of a paternity action does not automatically imply that it is in the best interests of the child. See Ferguson v. Winston, 27 Kan. App. 2d 34, 39, 996 P.2d 841, 846 (2000) ("The rights and interests of a child in his or her parentage are due process rights which cannot be terminated or affected without notice and an opportunity to be heard"). See also In re the Marriage of Ross, 245 Kan. 591, 783 P.2d 331 (1989). It cannot be assumed that ordering blood tests is automatically in the best interests of a child, especially a child who already has an existing presumed and legal father and a relationship with her parents and sister that is constitutionally protected. See Quillon v. Walcott, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 98 S. Ct. 549, 554 (1978), rehearing denied, 435 U.S. 918, 98 S. Ct. 1477 (1978).

Due process must be afforded when an individual is threatened by state action which would deprive that person of a protected liberty interest. The state has an interest in preserving the

integrity of the family and the best interests of the child. Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed 2d 1042, 1045 (1923). At no stage of this proceeding, however, has the child's best interest ever been considered.

Petitioners have a right to raise their children without state interference. The state should not be able to compel an intact family to submit to blood or genetic testing at the urging of a third party who files a lawsuit.

This case brings to light the enormous burden to which intact families can be subjected. Actions such as this have both high emotional and economic costs. Parents can deplete their financial resources and find themselves subjected to blood or genetic testing by any outsider who has no established parent-child relationship, but can simply harness the power of the state.

Because the court failed to consider the importance of the child's best interests, and the fundamental liberty interests of the family, petitioners ask this Court to accept review.

CONCLUSION

For these reasons, this Court should grant petitioners' petition.

Respectfully submitted,

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APPENDIX

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STATE OF MINNESOTA
IN SUPREME COURT
C6-99-1618

In Re the Matter of:

Benjamin G. Witso,

Respondent,

vs.

Mary C. Overby, et al., petitioners,
Appellants.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Mary C. Overby, et al., for rehearing in the above-entitled matter be, and the same is, denied.

IT IS FURTHER ORDERED that the motion of Benjamin G. Witso for attorney fees, be and the same is, denied.

Dated: August 16, 2001

BY THE COURT:

s/Edward C. Stringer
Associate Justice

627 N.W.2d 63

In re the Matter of Benjamin G. WITSO, Respondent,

v.

Mary C. OVERBY, et al., Petitioners, Appellants.

No. C6-99-1618.

Supreme Court of Minnesota.

June 7, 2001.

Syllabus by the Court

A putative father who is not a presumed father, upon filing an affidavit establishing the reasonable possibility that he could be the biological father of a child who already has a presumed father, may bring an action to compel the mother and the child to undergo blood or genetic tests to determine whether he is a presumed father as set forth in Minn.Stat. § 257.55, subd. 1(f) (2000).

John Robinson Hill, Larkin, Hoffman, Daly & Lindgren, Ltd., Bloomington, for appellants.

Susan Anne Daudelin, Walling & Berg, P.A., Minneapolis, for respondent.

Heard, considered and decided by the court en banc.

OPINION

STRINGER, Justice.

Respondent Benjamin Witso (Witso) seeks custody and visitation rights with his putative child M.R.O. and petitioned under the Minnesota Parentage Act (MPA)[1] for a court order to compel

[1] The MPA is codified in Minn.Stat. §§ 257.51-.74 (2000).

the child's mother, appellant Mary Overby (Overby), and M.R.O. to undergo blood or genetic testing to determine whether he is a presumed biological father of M.R.O. The district court granted Witso's petition but, on Overby's motion, certified as important and doubtful the following question as recast by the court of appeals:

> Must a paternity action be dismissed for lacking of standing when the petitioning putative father shows the requisite sexual contact but has not had genetic testing, which might establish the genetic basis for standing that arises from a positive genetic test?

The court of appeals answered the question in the negative and affirmed the district court. We now affirm the court of appeals.

Overby gave birth to M.R.O. on April 27, 1998. At the time of M.R.O.'s birth Overby was married to James Overby, and therefore, by statute, James Overby is M.R.O.'s presumed biological father. Minn.Stat. § 257.55, subd. 1(a) (2000). Witso alleges however, that he and Overby became involved in a two-year extra-marital affair that included frequent sexual contact during the period in which M.R.O. was conceived and that he is M.R.O.'s biological father. He supports his claim with an affidavit asserting that he and Overby had an intimate relationship over the time period alleged and that Overby admitted that he was M.R.O.'s biological father. Overby's responsive affidavit denies the two-year affair but admits that she and Witso had one sexual encounter that could have resulted in the conception of M.R.O. Overby denies that she told Witso that M.R.O. was his child and contends that she and her husband were trying to have second child and had frequent sexual contact during the period in which M.R.O. was conceived. Overby maintains that James Overby is M.R.O.'s biological father.

The issue in the certified question is one of statutory interpretation and is therefore a question of law that this court

reviews de novo. *In re Welfare of G.L.H.*, 614 N.W.2d 718, 720 (Minn.2000).

The right to bring a proceeding to establish paternity is totally a creature of the MPA. In the MPA the legislature adopted, with some modifications, the Uniform Parentage Act, a comprehensive set of laws designed to provide "substantive legal equality for all children regardless of the marital status of their parents * * * [including] the *sine qua non* of equal rights--the identification of the person against whom these rights may be asserted."[2] The MPA establishes that the father and child relationship may exist regardless of the marital status of the parents. Minn.Stat. §§ 257.52, 257.53 (2000).

The MPA provides the exclusive bases for standing to bring an action to determine paternity. *Morey v. Peppin*, 357 N.W.2d 19, 22 (Minn.1985). Whether and when a person may bring a paternity action depends on which presumptions of paternity, if any, apply. *See* Minn.Stat. § 257.57 (2000) Nine presumptions of paternity are set forth in section 257.55, generally divided between those based on marriage, Minn.Stat. § 257.55, subd. 1(a)-(c) (2000) and those based on circumstances other than marriage, Minn.Stat. § 257.55, subd. 1(d)-(i) (2000). Standing to bring a paternity action with respect to these presumptions is also based on statute.[3]

The issue here is whether Witso, a putative father who is not a presumed father under section 257.55, can bring an action to require Overby, the mother, and M.R.O., the putative child, to submit to blood or genetic testing to establish whether he is a presumed father under section 257.55, subd. 1(f) when M.R.O.

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[2] *Unif. Parentage Act*, 1973 Prefatory Note, 9B U.L.A. 289 (1987).

[3] Standing to bring a paternity action is provided in Minn.Stat. § 257.57, subds. 1-3 (2000). Subdivision 1 provides standing with respect to presumptions based on marriage, subdivision 2 provides standing with respect to presumptions based on evidence other than marriage and subdivision 3 provides standing when there is no presumption.

already has a presumed father. Section 257.55, subd. 1(f) provides that if "blood or genetic testing establishes the likelihood that he is the father of the child, calculated with a prior probability of no more than 0.5 (50 percent), is 99 percent or greater" then Witso is presumed to be the biological father. Witso thus seeks to establish a presumption of paternity in himself, and if successful, to proceed in district court to seek custody and visitation rights with M.R.O. as provided in Minn.Stat. § 257.541, subd. 2(b) (2000). Whether he is ultimately granted any such rights is not before us.

The court of appeals held that Witso is a party to this paternity action under Minn.Stat. § 257.57, subd. 2(1) (2000),[4] and as a party has the right to compel Overby and M.R.O. to submit to blood or genetic testing under Minn.Stat. § 257.62 (2000)[5] by

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[4] Minnesota Statutes § 257.57, subd. 2 (2000) provides:

> The child, the mother, or * * * a man alleged or alleging himself to be the father, * * * may bring an action: at any time for the purpose of declaring the existence of the father and child relationship presumed under section 257.55, subdivision 1, paragraph (d), (e), (f), (g), or (h), or the nonexistence of the father and child relationship presumed under clause (d) of that subdivision * * *.

The court of appeals states that Minn.Stat. § 257.57, subd. 1(b) limits the time one can use blood or genetic tests to challenge a marriage-based presumption to no more than three years after the child is born. *Witso v. Overby*, 609 N.W.2d 618, 622-23 (Minn.App. 2000). The court is correct in so far as a child, biological mother or presumed father under Minn.Stat. § 257.55, subd. 1(a), (b), or (c) may not use blood or genetic tests to declare the nonexistence of the presumed father's paternity after three years have passed since the child's birth. But that section would not prevent a putative father from bringing an action to declare his competing presumption of paternity.

[5] Minnesota Statutes § 257.62, subd. 1(a) provides:

> The court or public authority may, and upon request of a party shall, require the child,

alleging by affidavit sufficient bases for the requisite sexual contact. *Witso v. Overby*, 609 N.W.2d at 621-23. The court expressed concern that its ruling might open the door to casual assertions of paternity but concluded that the affidavit requirement in section 257.62, subdivision 1(a) provided the district court with adequate discretion to determine whether a factual basis exists to reasonably conclude that there was sexual contact sufficient for conception to occur. 609 N.W.2d at 621-23.

The Overbys argue that Witso does not have standing because the phrase "declaring the existence of the father and child relationship presumed" in section 257.57, subdivision 2 requires that Witso have evidence of blood or genetic tests establishing that he is a presumed biological father before he is permitted to commence a paternity action. In effect, the Overbys argue that Witso is foreclosed from bringing an action to conduct blood or genetic tests to determine whether he is a presumed father because he does not possess test results that show he is a presumed father. We disagree, as we do not believe that the legislative scheme posits such a chicken-or-egg dilemma. If a putative father were required to be a presumed father under Minn.Stat. § 257.55, subd. 1(f), the mother could foreclose the putative father from obtaining the test results to prove paternity. Further, the terms "alleged" or "alleging" in section 257.57, subd. 2 providing for who may bring an action would have no meaning independent from the term "presumed," clearly ignoring the important statutory distinction between the terms "alleged" or "alleging" and "presumed."

The structure and terminology of section 257.57 also evidence a clear legislative purpose to give putative fathers, in contrast to those already presumed to be fathers under Minn.Stat.

> mother, or alleged father to submit to blood or genetic tests. A mother or alleged father requesting the tests shall file with the court an affidavit either alleging or denying paternity and setting forth facts that establish the reasonable possibility that there was, or was not, the requisite sexual contact between the parties.

§ 257.55, subd. 1 (2000), a cause of action to establish a presumption of paternity. On the one hand subdivision 1 protects marriage-based presumptions by strictly limiting those who may directly challenge the existence of a presumption of paternity based on marriage to the child, the *biological* mother and a man *presumed* to be the child's father by virtue of Minn.Stat. § 257.55, subd. 1(a), (b) or (c). Minn.Stat. § 257.57, subd. 1.[6] On the other hand subdivision 2 of section 257.57 expands the category of those eligible to bring an action to declare the existence or nonexistence of the father and child relationship based on evidence outside of a marriage to mothers who are not necessarily biological mothers, a personal representative of the child, public authorities charged with support of the child, a personal representative or parent of the mother or an alleged father if the mother or alleged father has died or is a minor and men *alleged or alleging* themselves to be the father. Minn.Stat. § 257.57, subd. 2. Importantly subdivision 2 is not limited to the class of men who can bring an action under Minn.Stat. § 257.57, subd. 1. Putative fathers alleged and alleging themselves to be fathers, but not necessarily presumed fathers--e.g., Witso--are specifically authorized to bring an action under Minn.Stat. § 257.57, subd. 2 to establish their paternity.[7]

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[6] Minnesota Statutes § 257.57, subd. 1 provides:

> A child, the child's biological mother, or a man presumed to be the child's father under section 257.55, subdivision 1, paragraph (a), (b), or (c) may bring an action:
>
> (a) At any time for the purpose of declaring the existence of the father and child relationship presumed under section 257.55, subdivision 1, paragraph (a), (b), or (c); * * *.

[7] The dissent contends that the use of the word "the" in "the father and son relationship" in section 257.57, subd. 2(1) instead of the word "a" indicates that the statute refers to a specific preexisting presumed relationship. The use of "the" rather than "a" establishes nothing of the kind, as the use of the term "a" would suggest multiple fathers.

That an alleging father need not also be a presumed father is further evident from section 257.60, relating to who may and who must be made a party to a paternity action.[8] The section distinguishes those presumed to be fathers from those alleging themselves to be fathers when it provides that a "man presumed to be a father under section 257.55, or a man who alleges himself to be the father" may bring an action to "declare" the existence of the father-child relationship. Minn.Stat. § 257.60(3) (2000). If a putative father brings a paternity action and the mother denies the existence of the father and child relationship, the section requires the court to make the child a party to the action. *Id.*

The dissent also seeks to support its position by suggesting that "declare" in "declare the existence of the father and child relationship presumed under section 257.55" in section 257.57, subd. 2(1) must imply the preexistence of a presumption of fatherhood because subdivision 3 uses the word "determine" rather than "declare" in "determine the existence of the father and child relationship with respect to a child who has no presumed father under section 257.55 * * *." Minn.Stat. § 257.57, subd. 3 (2000). The difference in meaning between "declare" and "determine" in this context is de minimis--certainly insufficient to support the dissent's position. First, the definitions of the terms overlap making a distinction based on the dictionary or thesaurus tenuous at best. "Declare" can mean to "make evident or give evidence of"; "determine" can mean "to fix conclusively or authoritatively." Webster's Third New International Dictionary 586, 616 (1961). Second, even assuming that the terms differ in meaning, they are not necessarily mutually exclusive. A determination may be made as part of a declaration of legal rights and status. Finally, unlike the terms "alleged/alleging" and "presumed," the terms "declare" and "determine" are not used in contradistinction to each other in the Parentage Act.

[8] Minnesota Statutes § 257.60 (2000) provides: "The child shall be made a party whenever: * * * (3) an action to declare the existence of the father and child relationship is brought by a man presumed to be the father under section 257.55, or a man who alleges to be the father, and the mother of the child denies the existence of the father and child relationship."

Judicial opinions from other jurisdictions have held that putative fathers of children born to women married to other men have protectable interests in establishing their paternity. In Colorado, even before it legislatively adopted a presumption of paternity based on blood or genetic testing similar to Minnesota law, the supreme court held that a putative father was denied his right to equal protection when he was prevented from proving his paternity through blood or genetic tests under the state's parentage act. *R. McG. v. J.W.*, 200 Colo. 345, 615 P.2d 666, 672 (1980). After the presumption was adopted, the Colorado Court of Appeals, citing *R. McG. v. J.W.*, construed its parentage act to give a putative father standing to compel a mother and child to submit to blood or genetic testing. *See In re S.R.H.*, 981 P.2d 199, 202 (Colo.Ct.App.1998), *rev'd on other grounds sub nom., N.A.H. v. S.L.S.*, 9 P.3d 354, 366 (Colo.2000). Five members of the U.S. Supreme Court agreed that a biological father might have "a constitutionally protected interest in his relationship with a child whose mother is married to, and cohabitating with, another man at the time of the child's conception and birth." *Michael H. v. Gerald D.*, 491 U.S. 110, 133, 136, 157, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (Stevens, J., concurring in the judgment; Brennan, J., with Marshall and Blackmun, JJ., dissenting; White, J., with Brennan, J., dissenting). Justice Stevens concurred in the judgment denying the putative father an opportunity to establish his paternity only after concluding that under the California statute at issue the putative father "was given a fair opportunity to show that he is [the child's] natural father, that he developed a relationship with her, and that her interests would be served by granting him visitation rights. *Id.* at 135-36, 109 S.Ct. 2333.

We conclude that a party alleging he is a child's father has standing to bring a paternity action under section 257.57, subdivision 2 to compel blood or genetic testing as provided in section 257.62, subdivision 1 even though he does not at the time the action is commenced possess blood or genetic tests that establish he is the child's presumed father under section 257.55, subdivision 1(f). Witso thus has standing to bring this paternity action.

Our conclusion does not open the door to unfettered challenges to the sanctity of marriages, family unity and parent-child relationships. By vesting in the courts the safeguard of a judicial determination that a putative father has asserted by affidavit sufficient grounds to determine that sexual contact occurred between him and the child's mother that could reasonably have resulted in the child's conception as provided in Minn.Stat. § 257.62, subd. 1 (2000)[9] additional protection is provided against frivolous claims of paternity and a balance is achieved between the interests in the preservation and protection of familial relationships and the interests of the putative father to establish his paternity. In any event, here Overby has admitted that she had sexual contact with Witso that could have resulted in the conception of M.R.O.--thus there is no question that Witso's affidavit alleges sufficient facts establishing requisite sexual contact.

Finally, we note again that even if blood or genetic tests show that Witso is M.R.O.'s presumed biological father under section 257.55, subd. 1(f), James Overby is also a presumed biological father based on his marriage to Overby at the time of M.R.O.'s birth. Section 257.55, subdivision 2 requires the court to weigh the conflicting presumptions, and "the presumption which on the facts is founded on the weightier considerations of policy and logic controls." Minn.Stat. § 257.55, subd. 2 (2000). Thus, even though Witso may establish a presumption of biological fatherhood, whether he should be granted custodial or visitation rights with respect to M.R.O. is for an independent determination

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[9] Section 257.62 as originally enacted required the court to order a mother or child to submit to blood or genetic testing upon the request of a party to the action. Minn.Stat. § 257.62, subd. 1 (1980). In 1997 the legislature amended section 257.62, subd. 1 by adding: "A mother or alleged father requesting the tests shall file with the court an affidavit either alleging or denying paternity and setting forth facts that establish the reasonable possibility that there was, or was not, the requisite sexual contact between the parties." Act of May 29, 1997, ch. 203, art. 6, § 21, 1997 Minn. Laws 1587, 1766.

later to be made by the district court.[10] We affirm the court of appeals and answer the certified question in the negative.

Affirmed.

LANCASTER, Justice (dissenting).

Because the majority has fundamentally misconstrued the Minnesota Parentage Act and reached a result not contemplated by the statute, I respectfully dissent. As I read Minn.Stat. § 257.57, subd. 1(a) (2000), Benjamin Witso has no standing to bring a cause of action to challenge James Overby's marital presumption of paternity. Furthermore, absent a presumption in Witso's favor, he cannot bring suit to declare his own paternity under Minn.Stat. § 257.57, subd. 2(1) (2000). Neither Minn.Stat. § 257.60 (2000) (discussing who may be party to an action but not addressing who has standing to bring an action) nor Minn.Stat. § 257.62 (2000) (allowing a party to a paternity suit to request blood testing) changes the fact that Witso does not have standing to bring an action to establish a father and child relationship between himself and M.R.O.

Although Witso allegedly seeks only to declare the existence of his paternity under Minn.Stat. § 257.57, subd. 2, as opposed to challenging Overby's presumption of paternity under section 257.57, subdivision 1, it is necessary to consider both subdivisions to clarify the error in the majority's reading of the statute. Section 257.57, subdivision 1, reads in relevant part:

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[10] The dissent's concern that the court's holding may be abused by a rapist or any man armed with an affidavit is overstated. The trial court clearly has discretion to determine whether the affidavit meets the statutory requirement in section 257.62, subd. 1. In any event however, it is not for this court to interpret a statute to mean something different than what the legislature clearly intended in order to avoid a potential abuse in a hypothetical circumstance not before the court. As noted above, the statutory framework establishes the putative father's right to obtain blood and genetic testing subject to statutory preconditions, and those preconditions are met in the matter before the court.

> A child, the child's biological mother, or a man presumed to be the child's father under section 257.55, subdivision 1, paragraph (a), (b), or (c) may bring an action:
>
> * * * *
>
> (b) For the purpose of declaring the nonexistence of the father and child relationship presumed under section 257.55, subdivision 1, paragraph (a), (b), or (c) [only within certain time limitations].

As described by the majority, Minn.Stat. § 257.55, subd. 1(a)-(c), discusses the presumptions of paternity based on marriage. Thus, section 257.57, subdivision 1, allows only "a man presumed to be the father" under a marital presumption to bring suit to declare the nonexistence of his own or another man's marital presumption of paternity. Because Witso has no marital presumption in his favor, he has no standing under subdivision 1 to challenge James Overby's material presumption.

There is a very clear policy reason for this limitation on the ability to challenge a marital presumption; once a family unit has been established, it is very often in the best interests of the child to leave it undisturbed. *See Michael H. v. Gerald D.*, 491 U.S. 110, 124, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) ("[T]he institution of the family is deeply rooted in this Nation's history and tradition."); *See also IN re Marriage of Ross*, 245 Kan. 591, 783 P.2d 331, 335 (1989) (recognizing, in a UPA state, "the ancient presumption of the legitimacy of a child born in wedlock is one of the strongest presumptions known to the law"); *B.H. v. K.D.*, 506 N.W.2d 368, 376 (N.D.1993) ("[P]arenting and the family unit are important considerations worthy of constitutional protection."). Even if, as the majority implies, an unmarried man like Witso could have a due process interest in a father-child relationship where there is already

a presumed father in place, that interest would not arise when he has nothing more than a biological relationship. *See generally Michael H.*, 491 U.S. at 133, 136, 157-58, 109 S.Ct. 2333 (Stevens, J., concurring in judgment; Brennan, J., with Marshall and Blackmun, JJ., dissenting; White, J., dissenting) (agreeing that a biological father might have a constitutionally-protected interest in his relationship with a child whose mother was married to another man at the time the child was born). Rather, "an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, [but] such a link combined with a substantial parent-child relationship will do so." 491 U.S. at 142-43, 109 S.Ct. 2333 (Brennan, J., with Marshall and Blackmun, JJ., dissenting). Here, the record contains no evidence demonstrating the existence of a "substantial parent-child" relationship. In any event, Witso never raised a due process or equal protection argument and therefore conjecture like that engaged in by the majority today is fruitless.

Minnesota Statutes § 257.57, subd. 2, also does not give Witso standing to bring suit to declare the existence of his own father and child relationship with M.R.O. Subdivision 2 states:

> The child, the mother, or * * * a man alleged or alleging himself to be the father * * * may bring an action:
>
> (1) at any time for the purpose of declaring the existence of the father and child relationship presumed under section 257.55, subdivision 1, paragraph (d), (e), (f), (g), or (h) * * *.

Witso and the majority would have us believe that section 257.57, subdivision 2(1), gives Witso, a man "alleging himself to be the father," standing to obtain blood tests and establish a section 257.55, subdivision 1(f), genetic testing presumption of paternity in himself. But this interpretation ignores the explicit language of section 257.57, subdivision 2, which allows any

putative father to bring an action to declare the existence of "*the* father and child relationship presumed under section 257.55." Minn.Stat. § 257.57, subd. 2(1) (emphasis added). The use of "*the* father and child relationship" instead of "*a* father and child relationship" indicates that the statute is referring to a specific preexisting presumed relationship. Section 257.57, subdivision 2, thereby requires that Witso's genetic testing presumption must have existed before he could have standing to declare the existence of a father and child relationship based on that presumption. Because Witso does not have that preexisting presumption, he has no standing to bring the instant suit.[11]

The majority's characterization of this plain reading interpretation as creating a "chicken-or-egg dilemma" not only glosses over the statutory significance of each section, but also usurps the legislature's rightful role in setting public policy. The majority is wrong, I believe, in failing to acknowledge that important public policies are advanced by Minnesota's legislative adaptation of the UPA. The North Dakota Supreme Court recognized those policies when interpreting North Dakota's parentage statute, which is also based on the UPA and recognizes a paternity presumption based on genetic testing. *B.H. v. K.D.*, 506

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[11] This is not to say that a putative father would never have standing to declare the existence of his, or another's, paternity. Section 257.57, subdivision 2, gives any putative father standing to declare the existence or nonexistence of his own paternity if there are preexisting facts--such as a signed recognition of parentage or evidence that the putative father received the child into his home and held the child out as his biological child--indicating the putative father was a presumed father. A putative father without a presumption in his favor could also bring suit if he were seeking to declare the nonexistence of *another man's* presumption of paternity based on that man's blood tests or recognition of parentage. Other portions of the MPA also confirm that a putative father will have standing to bring a paternity suit in certain circumstances. Minn.Stat. § 257.60 (2000) ("The child shall be made a party whenever * * * (3) an action to declare the existence of the father and child relationship is brought by a man presumed to be the father under section 257.55, or a man who alleges to be the father * * *."). The facts of this case do not present one of those circumstances.

N.W.2d at 373-75. Like the present case, *B.H. v. K.D.* involved a man who had no presumptions in his favor but alleged to be the father of a child who already had a presumed father based on a marital presumption. *Id.* at 370. The alleging father moved the district court to order blood tests in order to aid him in proving his paternity. *Id.* Interpreting statutory provisions strikingly similar to those now before this court, the North Dakota Supreme Court held:

> There must be genetic tests already in existence which satisfy the statistical qualifications of the statute. Without the requisite test results, an individual like [the alleging father] cannot bring such an intrusive action, disrupting an established family, hoping that tests ordered by the court will subsequently vest him with standing to proceed. Too much irreparable damage will have occurred to the family in the meantime; the potential for abuse is too great.

Id. at 375.

The error of the majority's decision is further shown by Minn.Stat. § 257.57, subd. 3 (2000). Subdivision three permits an action to determine the existence of a father and child relationship when the child has no presumed father. Under subdivision 3, a putative father would not attempt to "*declar[e]* the existence of the father and child relationship presumed under section 257.55" as in subdivisions one or two, but would bring "[a]n action to *determine* the existence of the father and child relationship with respect to a child who has no presumed father under section 257.55." Minn.Stat. § 257.57, subd. 3 (emphasis added). While making much of the difference between "presumed" and "alleged" in the MPA, the majority ignores the differences between "determine" and "declare" as used within section 257.57. A party bringing an action to "declare" the existence of a father and child relationship

presumed in section 257.55 seeks to "make known clearly or officially" the preexisting factual presumption. *Roget's 21st Century Thesaurus* 201 (2d ed.1999). In contrast, an action to "determine" the existence of a father and child relationship suggests a process of discovering whether such a relationship, and thus a presumption, exists.[12] *See id.* at 222 (listing "discover" as synonym to "determine," but not listing "declare"). In any event, Witso can bring neither action because in the first instance (under section 257.57, subd. 3) a presumed father already exists.[13]

Although the majority attempts to interpret sections 257.60 and 257.62 to support its holding, the majority's reading is again in error. The Overbys accurately point out that the carefully constructed MPA sets forth in section 257.57 when a putative father has standing to bring suit; then in section 257.60 when a putative father may be made party to a suit; and, finally, in section 257.62 when a party to a suit may seek genetic testing. The court looks to statutory sections as a whole in construing each part

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[12] This distinction is highlighted in other states' parentage acts. In Colorado, for instance, "[a]ny interested party * * * may bring an action at any time for the purpose of *determining* the existence or nonexistence of the father and child relationship" under the nonmarital presumptions. Colo.Rev.Stat. § 19-4-107, subd. 2 (2000) (emphasis added). However, only the mother, child, or presumed father may bring an action to "*declar[e]* the existence" or nonexistence of a father-child relationship under the marital presumptions. *Id.*, subd. 1(a)-(b) (2000).

[13] Another flaw in the majority's analysis is that it finds no difference between section 257.57, subd. 2(1), and subd. 3; a putative father with no presumptions in his favor and facing no presumptions in another could, without limitation on time or circumstance, bring an action to obtain genetic testing under either subdivision. The problem with this interpretation is, of course, that it renders either subdivision 2(1) or subdivision 3 superfluous in this circumstance despite this court's well-settled practice of assuming that statues are not extraneous. *See In re Paternity of J.A.V.*, 547 N.W.2d 374, 376 (Minn.1996) ("We are guided by the principle that [statutes governing the parent and child relationship] must be applied in a manner that is internally consistent * * * and assuming that each statutory provision has a purpose.").

of the statute. *See Lenz v. Coon Creek Watershed Dist.*, 278 Minn. 1, 11-12, 153 N.W.2d 209, 217-18 (1967) (noting that when construing a provision of a statute, courts should look beyond the words of the provision and look to section as a whole); *In re J.A.V.*, 547 N.W.2d at 376 (stating that the adoption, parentage, and termination of parental rights statutes involve a common thread and must be interpreted consistently in conjunction with one another). Minnesota Statutes § 257.60, which states that "each man presumed to be the father under section 257.55, and each man alleged to be the biological father, shall be made parties," does not independently enable putative fathers to single-handedly disrupt the family relationship. Rather, it must be read in conjunction with section 257.57, which limits the situations in which a man without any presumptions in his favor has standing to bring a paternity suit in the first place. Taking sections 257.57 and 257.60 together, it is clear that a putative father, like Witso, could be a party to a suit under section 257.60 without having any presumptions of paternity in his favor,[14] but it does not follow that the putative father automatically has standing to bring suit under section 257.57, subd. 2. As the MPA is written, a putative father must satisfy certain conditions before bringing suit that are not prerequisites for becoming a party to a suit.

Ignoring this distinction, the majority concludes that because Witso is a proper party under its reading of section 257.57, subdivision 2(1), he can seek genetic testing under section 257.62. Section 257.62 states in pertinent part: "The court or public authority may, and upon request *of a party* shall, require the child, mother, or alleged father to submit to blood or genetic tests." Minn.Stat. § 257.62, subd. 1(a) (emphasis added). I agree with the majority that only a party to a suit may seek genetic tests, but I cannot agree that Witso is a proper party to the instant suit. Because Witso did not have standing under section 257.57 to bring

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[14] The statute could not be otherwise, of course; if men alleged to be the father could not be parties, no mother or child could ever seek to prove the alleged father's paternity or ensure that, upon determination of a biological relationship, the responsibilities of fatherhood were enforced.

this suit and because he has not been made a party to a suit brought by another, section 257.62 does not give Witso the right to seek blood testing.

Furthermore, the majority denies that its holding creates the potential for abuse by "open[ing] the door to unfettered challenges to the sanctity of marriage" and asserts that baseless and intrusive paternity challenges will not follow from its holding because section 257.62, subdivision 1, requires a putative father who is requesting genetic tests to file an affidavit alleging facts regarding sexual contact with the mother at the relevant time. Contrary to the majority's assertions, section 257.62 does not provide an adequate safeguard against the very real potential for abuse of today's holding. Any man with an affidavit claiming that he had sexual contact with the mother during the period of conception may, after today's opinion, intrude upon an established family unit. Minn.Stat. § 257.62, subd. 1(a) ("A mother or alleged father requesting the tests shall file with the court an affidavit either alleging or denying paternity and setting forth facts that establish the reasonable possibility that there was, or was not, the requisite sexual contact between the parties."). Although the majority emphasizes that in this case Mary Overby admitted the sexual contact, it is irrelevant under section 257.62 whether the mother admits or denies the contact. *Id.*

Finally, even if the mother admits the sexual contact, the majority's reading, taken to its logical conclusion, would give any man who raped the mother standing to obtain blood tests and therefore assert his paternity of the resulting child.[15] *See* Minn.Stat. § 257.62, subd. 1(a). If the legislature had meant for this statute to create such an intrusive and extreme result, surely it would have stated so explicitly. *See In re J.A.V.*, 547 N.W.2d at 377 (stating that, if the legislature had intended to radically change the parent-child relationship, "it surely would have done so in language of greater clarity than we find here."). *See generally Michael H.*, 491 U.S. at 124 n. 4, 109 S.Ct. 2333 (recognizing the grave problems with giving a rapist a liberty interest in establishing a father and

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[15] This point was conceded at oral argument.

child relationship with a child potentially begotten by rape). Because I cannot see the legislature intended the result at which the majority arrives, I must dissent.

BLATZ, Chief Justice (dissenting).

I join in the dissent of Justice Lancaster.

RUSSELL A. ANDERSON, Justice (dissenting).

I join in the dissent of Justice Lancaster.

609 N.W.2d 618

In re the Matter of Benjamin G. WITSO, Respondent,

v.

Mary C. OVERBY, et al., Appellants.

No. C6-99-1618.

Court of Appeals of Minnesota.

March 9, 2000.

Syllabus by the Court

Under Minnesota's Uniform Parentage Act, a man who provides a factual foundation for his claim that he fathered a child has standing to commence an action to establish paternity and to seek genetic testing to confirm his standing to continue that action, even when there is already a presumed father.

Susan A. Daudelin, Walling & Berg, P.A. Minneapolis, for respondent.

John R. Hill, Larkin, Hoffman, Daly & Lindgren, Ltd., Bloomington, for appellants.

Considered and decided by DAVIES, Presiding Judge, LANSING, Judge, and HARTEN, Judge.

OPINION

DAVIES, Judge

FACTS

Respondent Benjamin Witso brought this action in April 1999 to establish that he was the father of M.R.O., a child born to appellant Mary Overby in April 1998. Mary Overby is--and was at the time of the conception and birth--married to appellant James

Overby. She concedes she had sexual relations with respondent about the time of M.R.O.'s conception.

The Overbys moved to dismiss Witso's paternity petition, asserting that he lacks standing because he does not have the positive genetic-test evidence he needs to make him a presumed father; it is not disputed that, if he were a presumed father, he would have standing. The Overbys have refused to sign a release to allow genetic testing. The district court denied the motion to dismiss and ruled that Witso made a showing that gave him a right to genetic testing, notwithstanding James Overby's presumed paternity as the husband of the mother.

The district court ordered genetic testing and sealed the results; it then certified as important and doubtful this question:

> When the biological mother admits having had intercourse with the putative father during the period of possible conception * * * does the putative father have standing to compel the mother and child to submit to [genetic testing to establish a basis for a paternity presumption]?

To make the certified question reflect the actual issue, we recast it as follows:

> Must a paternity action be dismissed for lack of standing when the petitioning putative father shows the requisite sexual contact but has not had genetic testing, which might establish the genetic basis for standing that arises from a positive genetic test?

We answer this question in the negative and affirm.

ISSUES

I. Is this certified question properly decided at this time?

II. Must a paternity action be dismissed for lack of standing when the petitioning putative father shows the requisite sexual contact but has not had genetic testing, which might establish the genetic basis for standing that arises from a positive genetic test?

ANALYSIS

I.

This court should properly answer a certified question that asks whether a motion to dismiss was properly denied. The certified question here falls squarely within the terms of the rule of civil appellate procedure that an appeal may be brought to this court "if the trial court certifies that the question presented is important and doubtful, from an order which denies a motion to dismiss * * *." Minn. R. Civ.App. P. 103.03(h).

We note also that, were we to decline review, as the dissent urges, the result of the genetic test will be revealed without the opportunity for further appeal. Because rejecting certification would insulate the decision from review and deny the Overby's their day in this appellate court, the interests of justice compel consideration of the certified question at this time. *See* Minn. R. Civ.App. P. 103.04 (Appellate courts "may review any other matter as the interest of justice may require.").

II.

"Whether the trial court properly interpreted the parentage act is a question of law, which we review without deference to the trial court's conclusions." *In re Welfare of C.M.G.*, 516 N.W.2d 555, 558 (Minn.App.1994).

The Minnesota Parentage Act provides, in Minn.Stat. § 257.57, subd. 2(1) (1998), that a man alleging himself to be the father of a child may bring an action "for the purpose of declaring the existence of the father and child relationship" based on a *presumed* father status under any of the clauses in Minn.Stat. § 257.55, subd. 1 (1998). Under clause (f) of that subdivision, a man's paternity is presumed if

> [e]vidence of statistical probability of paternity based on blood or genetic testing establishes the likelihood that he is the father of the child * * * is 99 percent or greater.

Minn.Stat. § 257.55, subd. 1(f) (1998). That is the basis respondent asserts for his paternity presumption.

This court, in discussing competing presumptions, has stated that the paternity presumption of the mother's husband does not automatically prevail over a genetic-test-based presumption of paternity. *Kelly v. Cataldo*, 488 N.W.2d 822, 827 (Minn.App.1992), *review denied* (Minn. Sept. 15, 1992). The *Kelly* court stated:

> First, the legislature has withheld a declaration of the weightier presumption, directing instead that the courts adjudicate the issue. Second, and more significantly, the legislature has directed the courts, when weighing considerations of policy and before [determining the] governing conflicting presumptions, to examine the case "on the facts."

Id.

A positive genetic test thus creates a presumption of paternity that would, in this action to establish paternity, compete with the presumption of paternity applicable to the mother's husband. As this court held in *Kelly*, the legislature has not declared that one of these provisions is necessarily weightier or that one automatically trumps the other. When competing presumptions are established, the district court in an action to establish paternity must determine which presumption should control by evaluating on the facts which presumption is founded on the weightier considerations of logic and policy. Minn.Stat. § 257.55, subd. 2 (1998). *Kelly* confirmed the judicial obligation in each case to weigh competing marriage and genetic-based presumptions.

The narrow question before us in this case, therefore, is whether a district court must dismiss for lack of standing before the petitioner obtains the genetic testing that may establish the "statistical probability" that gives rise, first, to a genetic-based presumption of his paternity and, second, to the resulting standing to maintain to its conclusion an action to establish the petitioner's paternity.

Although the petitioner in *Kelly* already had a positive genetic test--and the resulting presumption--the *Kelly* court foresaw the question square presented in this case:

> [W]e need not determine here the difficult issue which arises when a proceeding such as this is initiated by a man who shows reason to believe testing will demonstrate his presumptive parenthood but who has no present evidence of genetic testing.

Kelly, 488 N.W.2d at 828. The *Kelly* court also stated that the question of ordering genetic tests was "invited but not answered by the legislature when it amended the parentage act [in 1989] to establish presumptive parenthood on the basis of genetic testing." *Id.*

We are not so certain the legislature has left the question unanswered. The statutes quite clearly allow a man in respondent's position to be a *party* to a parentage action:

> The child, the mother, or personal representative of the child, the public authority chargeable by law with the support of the child, the personal representative or a parent of the mother if the mother has died or is a minor, *a man alleged or alleging himself to be the father*, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor *may bring an action*:
>
> (1) at any time for the purpose of declaring the existence of the father and child relationship presumed under section 257.55, subdivision 1, paragraph (d), (e), (f), (g), or (h) * * *.

Minn.Stat. § 257.57, subd. 2 (emphasis added).

In addition:

> The biological mother, each man presumed to be the father under section 257.55, and *each man alleged* to be the biological father, *shall be made parties* * * *.[16]

Minn.Stat. § 257.60 (1998) (emphasis added).

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[16] A man alleging himself to be the biological father would appear to be a "man alleged to be a biological father."

Thus, under the statutes, respondent is a proper party to this action. And, once a party, he enjoys the right to a test provided to each party by the following:

> The court or public authority may, and *upon request of a party shall, require* the child, mother, or alleged father to submit to blood or genetic tests.

Minn.Stat. § 257.62, subd. 1(a) (1998) (emphasis added).[17]

In summary, a man "alleging himself to be the father" (respondent) is a party under section 257.57, subdivision 2. And, if the man alleging his own paternity (respondent) is an "alleged father"--a reasonable reading--he is also a "party" under section 257.60. Finally, if he is a party, he is entitled to an order for testing under section 257.62, subdivision 1(a).

The dissent views *R.B. v. C.S.*, 536 N.W.2d 634 (Minn.App.1995), as dispositive of the issue in this appeal. Unlike the dissent, we do not read *R.B.* as controlling. In *R.B.*, a putative father was denied a test, but in that case an earlier *adjudication* of paternity overrode all presumptions of paternity--whether based on marriage or genetic testing. *Id.* at 636; *see* Minn.Stat. § 257.55, subd. 2 (1994) (presumption of paternity under this section "is rebutted by a court decree establishing paternity of the child"). Thus, a ruling on the right of putative fathers generally to obtain genetic testing was not necessary to the decision in *R.B.*--nor would a ruling on the question have been appropriate. *See R.B.*, 536 N.W.2d at 635 ("Putative father has no standing *to assert paternity*

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[17] The provision continues:

> A mother or alleged father requesting the tests shall file with the court an affidavit either alleging or denying paternity and setting forth facts that establish the reasonable possibility that there was, or was not, the requisite sexual contact between the parties.

where another man has been adjudicated the father.") (emphasis added).[18]

R.B. is helpful as a guide, however, for in its second ruling (after ruling that the putative father had no right to what was in that case a legally pointless test) the court held that the child could obtain a compelled genetic test. This was because the child was still entitled to challenge the paternity of the adjudicated father and to establish paternity instead in the man alleged to be the genetic father. *Id.* at 638-39 (dismissal of child's "request for [genetic testing] is reversed and remanded"). Thus, the *R.B.* court granted a right to obtain genetic testing to the one party who could make legal use of genetic-test results--the child. Here, respondent is very much in the same *legal* position of the child, that is, still entitled to make legal use of genetic-test results. This *R.B.* ruling is the only judicial guide available as we address the question before us today: whether a party asserting paternity has standing to seek an order for a compulsory genetic test.[19]

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[18] The dissent argues that the earlier adjudication that was decisive in *R.B.* was less than a real adjudication. But, though uncontested, the adjudication was a true adjudication, one by stipulation--a type of adjudication we generally welcome.

[19] Two other states, which like Minnesota have added a genetic presumption to their parentage acts, have come to conflicting conclusions on whether a putative father has standing to compel a test when there is already a *presumed* father. *Compare B.H. v. K.D.*, 507 N.W.2d 368, 374-75 (N.D.1993) (holding that man, in absence of genetic test, lacks standing to assert paternity when marital presumption of paternity already exists), *with In re S.R.H.*, 981 P.2d 199, 202 (Colo.Ct.App.1998) (holding putative father has standing to assert paternity without first having obtained genetic testing, even when marital presumption of paternity already exists), *cert. granted* (Colo. Aug. 2, 1999). Because these cases point in different directions and were likely decided based on slightly different statutory provisions, they do not provide significant guidance for our decision.

We rule, based on statutory interpretation and on *R.B.*, that a paternity action should not be dismissed before the putative father has had an opportunity to obtain genetic testing.

We view the issue primarily as one of discovery and procedure, rather than a question of substantive right. *See Garrity v. Kemper Motor Sales*, 280 Minn. 202, 207, 159 N.W.2d 103, 107 (1968) (discovery objective is to allow each party opportunity to obtain all facts relative to its claim or defense). The underlying substantive right respondent asserts was established in *Kelly*; he needs only to discover the fact with which he can prove up a predicate for his claimed paternity.

Our ruling will not allow unreasonable fishing expeditions or casual assertions that a birth was a result of an extramarital relationship. First of all, the presumption of a father-child relationship between a man and a child born to his wife during their marriage can be challenged only

> If the action is brought within two years after the person bringing the action has reason to believe that the presumed father is not the father of the child, but in no event later than three years after the child's birth.

Minn.Stat. § 257.57, subd. 1(b) (1998).

In addition, issues of discovery and procedure are committed to the sound discretion of district courts. And, to obtain testing, a putative father must give a sworn affidavit setting forth facts sufficient to provide a factual basis for believing the genetic-test result may be relevant. Minn.Stat. § 257.62, subd. 1(a) ("alleged father" who requests testing must file affidavit alleging paternity and setting forth facts establishing reasonable probability of "the requisite sexual contact between the parties").

This provision, requiring an affidavit before an alleged father becomes entitled to a genetic test, was added in 1997. 1997

Minn. Laws ch. 203, art. 6, § 21. The legislature did not use "presumed father" to describe who is entitled to a genetic test, but rather used the language "alleged father." The legislature, therefore, created a right for a man to obtain genetic testing though not a presumed father. This discovery and procedural mechanism gives a putative father the right to obtain the information necessary to establish genetic paternity and, thus, to have his paternity action decided on its merits.

The parentage act allows for the possibility of conflicting presumptions of paternity. *State v. Thomas*, 584 N.W.2d 421, 423 (Minn.App.1998), *review denied* (Minn. Nov. 17, 1998). To deny putative fathers genetic testing would mean a mother could suppress the truth and frustrate the policy of Minn.Stat. § 257.55, subd. 1(f). *See id.* at 424 ("When you have two men actively wanting to be involved in the life of a minor child, the best interests of the child will be served by a careful balancing of all the policy considerations (too numerous to mention) and the courts will have the luxury of looking at two men who want to be the father.").

Denying Witso and other men similarly situated a lawful procedure to obtain genetic testing also risks disruptive self-help to obtain locks of hair, skin cells, or other genetic specimens. *See Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 169 (Minn.1989) (policy of self-help contravenes public policy); *Berg v. Wiley*, 264 N.W.2d 145, 151 (Minn.1978) ("[i]n our modern society, with the availability of prompt and sufficient legal remedies as described, there is no place and no need for self-help"); *see also Glorvigen v. Glorvigen*, 438 N.W.2d 692, 700-01 (Minn.App.1989) (Crippen, J., concurring specially) ("because unjust decisions are not always attacked through formal process, we enlarge the occurrence of self-help efforts to destroy acceptance of judicial decrees").

Finally, we note again the limited consequence from allowing respondent to have the genetic testing he requests. If the test shows respondent to be the biological father, there will be conflicting presumptions of paternity. Then the presumption that "is founded on the weightier considerations of policy and logic controls." Minn.Stat. § 257.55, subd. 2. Those considerations require the district court to look at blood relationships, marriage,

and the best interests of the child to determine which of the presumed fathers should be adjudicated the legal father. *Thomas*, 584 N.W.2d at 424.

Our decision to give respondent the test he requests does not in any way imply that respondent, if he is the biological father of the child, should prevail over James Overby's marital presumption. We express no opinion on how the district court should resolve that conflict of presumptions, if it in fact arises.

DECISION

We answer the certified question in the negative, concluding that dismissal before genetic testing would not have been proper. The district court's decision to order genetic testing and not to dismiss the action was proper.

Affirmed.

HARTEN, Judge (dissenting)

I dissent on both procedural and substantive grounds. Procedurally, the majority misinterprets Minn. R. Civ.App. P. 103.03(h) and misapplies Minn. R. Civ.App. P. 103.04 in accepting the certified question; substantively, the majority misconstrues Minn.Stat. §§ 257.57, .60, and .62 and ignores controlling precedent in answering that question.

Minn. R. Civ.App. P. 103.03(h) provides that:

> If the trial court certifies that the question presented is important and doubtful [an appeal may be taken] from an order which denies a motion to dismiss for failure to state a claim upon which relief can be granted or from an order which denies a motion for summary judgment.

There is no such order here. The majority contends that this is an appeal "from an order which denies a motion to dismiss," but the motion to dismiss here was brought for lack of standing, not, as the rule requires, "for failure to state a claim upon which relief can be granted." The majority's interpretation impermissibly broadens the rule.

Minn. R. Civ.App P. 103.04 provides for appellate review of "any other matter as the interests of justice may require." In "the interests of justice," the majority accepts the certified question in order to give "[appellants] their day in this appellate court." But in giving appellants their day in court, the majority compels them to risk destruction of a belief integral to their family structure, i.e., the paternity of James Overby. As the majority notes, the district court will still be free to adjudicate him the legal father, but even an adjudication will be powerless to restore that belief. The majority misapplies Minn. R. Civ.App. P. 103.04; the interests of justice do not require such a result.

The majority cites various provisions of the parentage act to contend that the legislature has not "left the [certified] question unanswered" because parties to a paternity action are entitled to blood tests and putative fathers are parties to paternity actions. But the majority's construction depends on transposing language included in one provision to another provision.

Minn.Stat. § 257.57, subd. 2, provides that when paternity is presumed under some of the statutory criteria, "a man alleged *or alleging himself to be* the father" may bring an action to establish paternity. (Emphasis added.) Minn.Stat. § 257.60 does not include the emphasized language; it provides that parties to a paternity action shall include "each man alleged to be the biological father." Had the legislature wanted to do so, it could have repeated the "alleged or alleging himself to be" language that the majority's interpretation requires. But "a reviewing court 'cannot supply that which the legislature purposely omits or inadvertently overlooks.'" *Brandt v. Hallwood Management Co.*, 560 N.W.2d 396, 400 (Minn.App.1997) (quotation omitted), *review denied* (Minn. June 11, 1997). Moreover, "[w]here a statute enumerates the persons or things to be affected by its provisions, there is an

implied exclusion of others." *Id.* (quotation omitted). The majority's "reasonable reading" thus violates a canon of construction.

Finally, this court has already resolved the certified question. *R.B. v. C.S.*, 536 N.W.2d 634, 637 (Minn.App.1995), holds that "[i]n Minnesota, a putative father must be a presumed father in order to bring a paternity action under the parentage act." In *R.B.*, the child was born out of wedlock; the mother had never married either the presumed or the putative father, and the presumption was based on a signed stipulation of paternity approved by the court and entered as an adjudication. *Id.* at 636.

The majority attempts to distinguish *R.B.* on the ground that there, the paternity of the presumed father had been adjudicated. But here, there was no reason for an adjudication of James Overby's paternity: he and the child's mother are and have been married since before the child's conception, and that marriage is the basis for the presumption of his paternity. *See* Minn.Stat. § 257.55, subd. 1(a) (1998) (marriage to a child's mother establishes presumption of paternity).

Allowing a putative father standing to oppose a married presumed father, as here, but denying a putative father standing to oppose an adjudicated presumed father, as per *R.B.*, introduces an unwarranted and artificial distinction into the parentage law. That distinction means that, until a child of married parents is three, any man who provides an affidavit stating he had sexual relations with the mother around the time of conception will be legally entitled to genetic proof that the child is or is not his, regardless of the mother's or the child's interests. The potential for ensuing familial discord is incalculable.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
FAMILY COURT DIVISION

In re the Matter of:

Benjamin G. Witso,

Plaintiff,

and

Mary C. Overby and James Overby,

Defendants.

PA 39627

ORDER

The above-entitled matter came on before the Court on the 11th day of August, 1999, on the parties' cross motions. On August 27, 1999 the Court issued an order compelling, Defendant Mary C. Overby to "make [her daughter] Molly Riane Overby, along with herself if deemed necessary by the testing facility, available for [blood or genetic] testing, to be arranged and paid for by Plaintiff." Defendant Mary C. Overby has asked the Court to certify as important and doubtful the issue of the compelled genetic testing. Defendants moved to dismiss the case on the basis that Plaintiff lacked standing, and the Order compelling the test necessarily had the effect of denying the motion to dismiss. Plaintiff is represented by Susan A. Daudelin, Esq., and Defendants are represented by John R. Hill, Esq.

In the case of *Kelly v. Cataldo*, 488 N.W.2d 822 (Minn.App. 1992) the Court of Appeals observed that the 1989 amendments to Minnesota Statutes section 257.55, subd. 1(f) "demonstrate a question invited but not answered by the legislature when it amended the parentage act to establish presumptive parenthood on the basis of genetic testing. Is a man's standing to proceed to be determined before or after compulsory blood

testing?" Because the appellant therein successfully located existing genetic test evidence, the Court of appeals felt that it did not have to determine the "difficult issue" invited by the legislature. Obviously, if the Court of appeals felt that the amendment invited a "difficult issue," the issue must be an "important and doubtful" issue. Accordingly, this Court certifies as important and doubtful the following exact issue raised by a combination of the 1989 amendment and the precise facts at hand:

> When the biological mother admits having had intercourse with the putative father during the period of possible conception of the child at issue, the putative father acts promptly to compel blood or genetic testing, and the child is yet so young that she will not be cognizant of the testing procedure, does the putative father have standing to compel the mother and child to submit to the tests (keeping in mind that the trial court has reserved jurisdiction to appoint a guardian ad litem depending on the test results and then determine whether it is in the child's best interests that the litigation continue)?

Dated: September 15, 1999

s/Judge of the District Court

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
FAMILY COURT DIVISION

In re the Matter of:

Benjamin G. Witso,

Plaintiff,

and

Mary C. Overby and James Overby,

Defendants.

PA 39627

ORDER

The above-entitled matter came on before the Court on the 11th day of August, 1999, on the parties' cross motions. Plaintiff was represented by Susan A. Daudelin, Esq., and Defendants were represented by John R. Hill, Esq. Plaintiff moved in writing for an order directing Defendant Mary C. Overby to participate in paternity blood testing to determine whether Plaintiff is the biological father of Molly Riane Overby, moved to have Plaintiff adjudicated the father of Molly, and moved for custody and visitation rights. An oral motion to appoint a guardian ad litem was made during the hearing. Defendants moved to deny the motion and dismiss the case on the basis that Plaintiff lacks standing. The Court heard the arguments of counsel and analyzed the written submissions. Based thereon, as well as the attached Memorandum that is incorporated herein pursuant to Rule 52, the Court issues its Order as follows:

1. Plaintiff lacks standing to sue as a "presumed" father under Minnesota Statutes § 257.55, subd. 1(d).

2. Plaintiff may have standing to sue in the capacity of a presumptive father after the blood and/or genetic tests

contemplated by section 257.55, subd. 1(f) have been completed,[20] and based on the particular facts of this case, he has standing to commence an action to compel blood or genetic testing. Accordingly, Defendant Mary C. Overby is ordered and directed to make Molly Riane Overby, along with herself if deemed necessary by the testing facility, available for testing to be arranged and paid for by Plaintiff. Defendants' motion to dismiss the case for lack of standing is reserved until the blood tests have been received by the Court.

3. Plaintiff is ordered and directed to submit to the Court and counsel for Defendants a properly authenticated copy of the test results providing the information contemplated by section 257.55, subd. 1(f).

4. If the test results show a statistical probability of 99% or greater that Plaintiff is Molly's biological father, the Court will appoint a guardian ad litem to act on her behalf.

5. Plaintiff's motion for an order adjudicating him Molly's father and granting him custodial rights and/or visitation is reserved.

LET JUDGMENT BE ENTERED ACCORDINGLY

Date: August 27, 1999

_____

s/Judge of the District Court

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[20] One court does not defer the standing decision until the blood/genetic tests are obtained and instead holds that the UPA provisions "grant standing to a man claiming to be a child's biological father to commence an action under the Uniform Parentage Act without first having obtained genetic testing." *In the Matter of S.R.H.*, 1998 WL 821414 (Colo.App.)

MEMORANDUM

I. Introduction

Most of the facts are not in issue here. Year-old Molly Riane Overby was born on April 27, 1998, while the Defendants were married, and has lived in the Defendants' home since birth. Biological mother Mary C. Overby was a coworker of putative father, Plaintiff Benjamin C. Witso ("Witso"). Witso has alleged that he and Mary Overby had intercourse at or about the time of Molly's conception. Mary Overby denied the extent of the sexual relations alleged by Witso, but her counsel admitted at the beginning of the oral argument that Witso and Mary Overby did indeed have sexual relations. In her responsive affidavit Mary Overby also admits a modicum of sexual intercourse with Witso. The details and extent of their sexual relationship, beyond mere recognition that intercourse occurred near the time of conception, is not relevant.

It is also undisputed that Molly has never been in Witso's home. Witso alleges, and the Court will accept as true for purposes of this motion, that he has openly held himself out to his relatives and friends as Molly's father. He also asserts that Molly bears a striking resemblance to him and Mary Overby admitted that he is Molly's father. These assertions are disputed, but the Court need not resolve them for purposes of this Order. The reasons why certain fact issues need not be resolved and other fact allegations are being accepted as true for purposes of analysis will be explained later in this Memorandum.

At this juncture the case boils down to the following: when a biological, married mother admits that near the date of conception she had intercourse with a putative father to whom she was not married, can she refuse to participate in blood/genetic testing and/or refuse to allow the putative father to receive the child into his home and thereby deprive the putative father of standing to determine parentage? "Presumptive" fathers have standing to commence a paternity action, but of the nine statutory presumptions, four require the mother and the putative father to have entered into a recognition of parentage and three more require the mother and putative father

to have married or at least have attempted marriage. See Minn. Stat. § 257.55, subd. 1(a), (b), (c), (e), (g), (h), and (i). Since the biological mother can refuse to sign a recognition of parentage form or refuse overtures of marriage, she has the power to block these seven avenues to presumptive paternity. Similarly, unless the doctrine of "constructive receipt" into the home applies, the biological mother has the practical power to block any presumption of paternity based on subdivision (d), simply by preventing the putative father from satisfying the requirement that he receive the child into his home. Most courts have refused to intervene on the putative father's behalf when the biological mother refuses to allow the putative father any access to the child in question, but many of those discussions were not based on the UPA and at least one court that has considered this issue under the UPA has ordered access to enable the putative father to receive the child into his home and thus establish standing. The most intriguing question here is whether the biological mother can block the putative father from using blood/genetic testing to establish a presumption, merely by refusing to participate in the testing process. No Minnesota higher court has answered this question, but the Minnesota Court of Appeals has observed that the legislature invited, but did not answer, the question when it amended the parentage act to establish presumptive parenthood on the basis of genetic testing. According to the Court of Appeals, the amendment effectively poses the following question: "Is a man's standing to proceed to be determined before or after compulsory blood testing?" *Kelly v. Cataldo*, 488 N.W.2d 822 (Minn.App. 1992).

The issues that arose during the oral argument concern whether a guardian ad litem should be appointed for Molly and whether the guardian should enter the picture before or after the Court rules on the blood test request.

2. May a trial court order blood/genetic testing to determine the statistical probability of parentage before it rules on a motion to dismiss for lack of standing?

In *Pierce v. Pierce*, 374 N.W.2d 450,451 (Minn.App. 1985), the Court of Appeals' factual recitation mentions that, "A family court referee denied Robert Pierce's motion to have

paternity blood-testing performed on A.K." Robert Pierce, the putative father, claimed (although he admitted that he was "not certain") that he was the father of A.K. who was born while Candyce Pierce was married to Roger Koll. Candyce divorced Koll after A.K. was born and then married Robert Pierce. Other than mentioning the blood test motion in passing, the Court of Appeals opinion contains no discussion regarding the merits of the blood test motion. Accordingly, the opinion can hardly be championed as authority for the proposition that blood tests cannot be ordered on the motion of a putative father who can not be a presumptive father sans favorable blood or genetic test results. It is also important to understand that when *Pierce v. Pierce* was decided in 1985, the legislature had not yet fashioned a statutory presumption of parentage based on blood or genetic test results. Section 257.55, subd. 1(f) was not added until the 1989 amendments.

In 1992 the blood/genetic test issue surfaced again in the case of *Kelly v. Cataldo*, 488 N.W.2d 822 (Minn.App. 1992). At the trial court level the putative father provided questionable, non-documentary evidence of positive test results, but all evidentiary objections thereto were cured after the trial court proceedings when the father procured and the Court of Appeals accepted the requisite documentary test evidence. Because the defects in the putative father's standing were cured in this unusual manner, the Court of Appeals was able to avoid determining whether an action may be commenced by a putative father in order to compel blood/genetic tests and thus obtain the requisite standing by securing positive results. Even though the Court of Appeals did not resolve the issue, it nevertheless noted that it was indeed an open issue:

> He contends that the trial court erred in dismissing the case without ordering blood tests. Arguments of the parties on this issue demonstrate a question invited but not answered by the legislature when it amended the parentage act to establish presumptive parenthood on the

> basis of genetic testing. Is a man's standing to proceed to be determined before or after compulsory blood testing? ... Because appellant has successfully located existing genetic test evidence, we need not determine here the difficult issue which arises when a proceeding such as this is initiated by a man who shows reason to believe testing will demonstrate his presumptive parenthood but who has no present evidence of genetic testing.

488 N.W.2d at 828.

Blood/genetic test results once again were before the Court of Appeals in *Matter of Welfare of C.MG.*, 516 N.W.2d 555 (Minn.App. 1994), but the case did not present an opportunity for deciding the "difficult issue" identified in *Kelly v. Cataldo*. Test results were obtained (even though the tests were administered six months after the case was commenced) and the putative father was allowed to proceed with a test-based presumption of paternity in hand.

A legitimate opportunity for discussion and resolution of this "difficult issue" was presented in the case of *R.B. v. C.S.*, 536 N.W.2d 634 (Minn.App. 1995). Therein the putative father, R.B., surfaced about six months after C.M.A. was born, but R.B. only showed interest in C.M.A. after the child's mother died in an automobile crash and "rumors surfaced that the child might be the beneficiary of an insurance settlement." According to the Court of Appeals, R.B. "brought this paternity action seeking blood tests to determine C.M.A.'s paternity." The Court of Appeals fact recitation does not reveal whether the trial court ruled on a formal motion for blood tests or why the trial court ruled against R.B. if such a motion was brought. Instead, the appellate opinion only recites that the trial court dismissed the action "on summary judgment on grounds that the putative father lacked standing

because C.M.A. has an adjudicated father." 536 N.W.2d at 636. If the appellate opinion is accurate, the fact that C.M.A. already had an "adjudicated father" was an essential element of the trial court's determination that R.B. lacked standing. It also appears to have been an integral part of the Court of Appeals' analysis because after devoting just two sentences to the standing issues, and after not addressing the "difficult issue" identified in *Kelly v. Cataldo*, the Court of Appeals explained, "Furthermore, C.M.A. has an adjudicated father ... and that adjudication of paternity is determinative."

Reading between the lines, one could reasonably conclude that R.B. received such swift treatment by the Court of Appeals (swift in terms of not receiving any explanation why blood tests were not available to him) because of the manner in which he surfaced in C.M.A.'s life, i.e. on the wings of a rumored insurance windfall. At any rate, regardless of whether this take on *R.B. v. C.S.* is wrong, it is undeniable that the Court of Appeals did not confront and address head on the "difficult issue" of whether a man's "standing to proceed [is] to be determined before or after compulsory blood testing?" Accordingly, it appears that this "question invited but not answered by the legislature" remains to be answered.

In deciding whether to allow a man's standing to proceed to be determined after blood testing, one must not lose sight of the fact that, "Minnesota courts have observed that blood testing generally is the most accurate and reliable proof of paternity." *Johnson v. Van Blaricom*, 480 N.W.2d 13 8, 141 (Minn.App. 1992). This means that any decision to uniformly deny putative fathers the right to procure blood/genetic testing to establish paternity would have the effect of denying trial courts the most accurate and reliable proof of biological paternity.

Case law from other UPA jurisdictions provides mixed guidance. For example, California, a UPA state, does not allow putative fathers to secure blood tests in order to challenge a husband's presumption of paternity, but California's version of the UPA differs from the Minnesota version in a significant way. *See Dawn D. v. Superior Court (Jerry K)*, 952 P.2d 1139 (Cal. 1998).

California's version of the "Presumption of paternity" provision, (in Minnesota it is Minn. Stat. § 257.55), mirrors the former Minnesota version before Minnesota added the various non-husband based paternity presumptions, including the presumption based on statistical probabilities. An older version of the UPA that has not yet been amended to include a statistical probabilities presumption does not raise a question similar to the "question invited but not answered by the [Minnesota] legislature when it amended the parentage act to establish presumptive parenthood on the basis of genetic testing." That question is of course whether "a man's standing to proceed is to be determined before or after compulsory blood testing?" Since the California legislature has not presented the California Supreme Court with a similar intriguing question, the California Court's holding that California putative fathers have no right to compel blood/genetic testing before having their standing definitively determined can add nothing to the Minnesota debate. The two versions of the UPA are too fundamentally different.

Colorado is one of the few UPA states that has added a paternity presumption based on statistical probabilities, although it has lessened the threshold to 97%. The Colorado Court of Appeals has observed that to:

> require a genetic testing establishing a presumption of paternity before the filing of an action under the Uniform Parentage Act would produce an absurd, unreasonable result. The mother, her husband, or the child could simply refuse to submit to testing, thereby precluding an action to determine paternity and violating the natural father's constitutional guarantee of equal protection.

In the Matter of S.R.H., 981 P.2d 199 (Colo.App., 1998)

Whether or not equal protection guarantees enter the picture[21] is not before this Court and the Constitutional issues also add nothing to the analysis. As the Minnesota Court of Appeals stated in *Kelly v. Cataldo*, the intriguing question is one "invited" by the legislature when it added the statistical probability presumption of parentage. It is an intriguing question based on new statutory language, not the interplay of statute and constitutional privileges. A such, the Court must determine whether it would be an absurd, unreasonable result to conclude that the results of blood/genetic testing must be secured before the putative father may seek redress from the courts, while allowing the mother to prevent that redress by refusing to cooperate in the testing process. In that context, the observation of the Colorado Court of Appeals is helpful, independent of any constitutional considerations.

Whether the UPA contemplates that a court may intervene on behalf of a putative father's quest for presumptive fatherhood is an issue that has not been limited to the arena of statistical probability. In *Adoption of Marie R.*, 79 Cal.App.3d 624, 145 Cal.Rptr. 122 (1978), the California Court of Appeals held that a mother could effectively frustrate a putative father's attempt to acquire standing and do so with impunity: "cases have recognized that a mother may, by her conduct, prevent a natural father from securing even the minimal contact with the child [that is needed to establish a presumption of paternity]." *Id.* at 626. However, as pointed out in *Jermstad v. McNelis*, 258 Cal.Rptr. 519 (Cal.App. 3 Dist. 1989), this ability of mothers to frustrate the putative fathers' attempts at acquiring standing was based on the language of legitimization statutes that preceded the UPA. In contrast, "under the Uniform Parentage Act the judgment in an action to establish the father and child relationship under section 7006 could order that sufficient custody be granted the natural father to permit him to become a presumed father. . . . Despite the wishes of the mother, under the Uniform Parentage Act the natural father may acquire the

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[21] Plaintiff did not raise Equal Protection arguments in any of his pleadings. The Court notes, however, the seeming disparity in the rights of men and women who initiate actions under the UPA with regards to requesting blood tests.

status of a presumed father." *Id.* at 527-528. If a natural father may acquire the status of a presumed father by compelling sufficient' contact to receive the child into his home, it does not seem illogical to conclude that he also may acquire the status of a presumed father through the much less invasive and disruptive action of having blood/genetic tests administered.

In summary, no UPA state that has added the statistical probability presumption has directly ruled that a trial court cannot order blood/genetic tests to confirm or deny the existence of the presumption; cases holding that trial courts have no power to compel blood/genetic testing before deciding whether to dismiss a putative father's action for lack of standing either come from non-UPA states or UPA states that have not added the statistical probability presumption; the Minnesota Court of Appeals has acknowledged that the Minnesota legislature invited, but did not answer, the question of whether a man's standing to proceed is to be determined before or after compulsory blood testing; and one UPA state that has added the statistical probability presumption has ruled that blood/genetic tests may be ordered in order to acquire the presumption. Accordingly, this Minnesota trial court is left to its own devices.

The Court understands that its decision cannot be made in a vacuum and that ample public policy concerns are at play here, both for and against Plaintiff s position. (See the last three pages of the opinion in *McDaniels v. Carlson*, 738 P.2d 254 (Wash. 1987). However, most of the concerns expressed by child development experts are inapposite here where the child, Molly, is only one year old, and the only exercise at this juncture is the administration of blood/genetic testing, an event to which Molly will be oblivious at her young age. If the test results come back showing less than a 99% statistical probability, the case will end and there will have been no negative impact on Molly. If the tests come back showing a 99% or greater statistical probability that Plaintiff is her father, a guardian will be appointed and the court still will be in a position to assess all of the best interests angles before determining whether to proceed with this paternity action. This Court is not unmindful of the warning in *Kelly v. Cataldo*, to pay attention to "appellate decisions [from other jurisdictions] calling for a demonstration of

the child's best interests before proceeding to the step of compulsory blood tests." However, one of the three appellate decisions to which the court referred, *Ban v. Quigley*, 168 Ariz. 196, 812 P.2d 1014 (App. 1990), arose in Arizona, a non-UPA state, and the other two arose in UPA states before those jurisdictions added the statistical probability presumption. Both Kansas and Washington added their versions of the statistical probability presumption in 1994, long after *In re the Marriage of Ross*, 245 Kan. 591, 783 P.2d 331 (1989) and *McDaniels v. Carlson*, 108 Wash.2d 299, 738 P.2d 254 (1987). In other words, no court that has examined the issue since the adoption of the statistical probability presumption has deemed it necessary to involve the parties in a long, protracted evidentiary hearing to examine the child's best interests before deciding whether to order blood/genetic tests. To do so in the case of a year-old child would not seem to a good use of judicial resources or a prudent use of the parties' funds when the test results may well end the inquiry.

3. May a man who is not an undisputed biological father establish standing by showing that he has openly held the child out as his own and "constructively received" the child into his home, or must he show that the child was actually received into his home?

Defendants challenge Plaintiff's standing to sue "for the purpose of declaring the existence of a father and child relationship" between Plaintiff and one-year old Molly Riane Overby. Plaintiff submits that he has standing because he received Molly into his home and openly holds himself out as her biological father, citing Minn. Stat. § 257.55, subd. 1(d). This argument is a stretch, at least based upon the plain language of the statute, because there is nothing in Plaintiff s affidavit establishing that Molly has ever been received into his home. Plaintiff argues that under the rule of *Larson v. Schmidt*, 400 N.W.2d 131 (Minn.Ct.App. 1987), actual physical presence in the home is not required and that all he need establish is that Molly was accepted in his home "to the extent possible under the circumstances," i.e. "constructive receipt."

The rule of *Larson v. Schmidt* is inapposite. By its own terms, the rule set forth therein is limited to cases involving an "undisputed biological father":

> We hold that a man who is the undisputed biological father of a child satisfies the requirement in § 257.55, subd. 1(d), of "receiv[ing] the child into his home" by accepting the child into his home to the extent possible under the circumstances of the case. (emphasis added)

Placing the adjective "undisputed" before the phrase "biological father" was neither a mistake nor superfluous. The Court of Appeals made this clear when it discussed the California case law on which the *Larson v. Schmidt* rule was based: "Although [California] Civil Code § 230 presupposed the fact of biological parentage, unlike the UPA provision, the [California] case law construing it is instructive where, as here, biological parenthood is undisputed." In other words, the Court of Appeals explained that case law construing statutory language that presupposes biological parentage is not necessarily instructive when biological parentage is disputed, as it is here.

In addition to the fact that *Larson v. Schmidt* is inapposite, the California case law on which it was based has been altered in a way that no Minnesota Court can ignore. The operative language in Minnesota Statutes section 257.55, subd. 1(d) focuses on whether the putative father has received "the child into his home." (emphasis added). The California case law relied upon by the *Larson* court focused on markedly different operative language: i.e. whether the putative father had "received the child into his family." (emphasis added). Despite the marked difference between "home" and "family", California case law was found to be instructive. However, the California Supreme Court has had a more recent opportunity to interpret the exact operative language found in the Minnesota statute. In *Dawn D. v. Superior Court (Jeny K)*, 952 P.2d 1139, 1141 (Cal. 1998) the California Supreme

Court concluded that language requiring the child to be received into the putative father's "home" (as distinct from being received into his family) means just what it says, actual physical presence in the home. After studying the precise language and considering the statutory framework, the California Court also could find "no support for [the] constructive receipt [concept]," given the clear requirement that the child be received into the home.

Plaintiff argues that the shift in California case law is of intellectual interest only because the Minnesota Court of Appeals accepted the logic of the earlier California "constructive receipt" cases and made that concept a Minnesota concept, regardless of whether California has changed its view. This Court disagrees. Plaintiff is not just trying to adduce *Larson v. Schmidt* for the precise holding that applies in the context of "undisputed biological fathers." Rather, he is trying to expand the "constructive receipt" concept beyond "undisputed biological fathers" and extend the concept to putative fathers whose biological role is hotly disputed. In the context of an attempt to expand the scope of *Larson v. Schmidt* it is certainly appropriate to revisit its rationale before deciding to adopt an expansive approach.

Whether or not this Court agrees with the logic that "undisputed biological fathers" should be treated differently than fathers whose biological role is disputed, it certainly cannot be denied that arguments exist for treating them in a different manner and many people may find those arguments compelling. In the case of *Markert v. Behm*, 394 N.W.2d 239, 244 (Minn.App. 1986), the Court of Appeals referred to, without articulating, "the compelling public policy concerns of protecting the minor child from the 'permanent stigma and distress which would undoubtedly' result if putative fathers...were granted standing." If it is true as the Court of Appeals observed that children are bound to suffer permanent stigma and distress when subjected to a putative father's action to "establish the existence of a father and child relationship," it is logical for a legislative body to make it more difficult for fathers whose biological role is disputed to establish standing than "undisputed biological fathers." The UPA and Minnesota Chapter 255 even differentiate between putative fathers based on the statistical probability of fatherhood. When parentage is disputed,

but blood or genetic testing establishes a 99% or greater likelihood of parentage, a putative father is granted standing to sue, but if blood or genetic testing establishes only a 98.9% likelihood of parentage, the putative father must look elsewhere for standing. Certainly the legislature has the power to draw such a line. In fact, in Montana and North Dakota the line has been drawn at 95%, in Colorado it has been drawn at 97%, and in Hawaii and New Mexico, like Minnesota, it has been drawn at 99%. The legislative bodies that drafted these individual amendments to the UPA apparently felt comfortable subjecting children to the permanent stigma and distress of a paternity action when the likelihood of parentage is 95%, 97%, or 99% or greater, but not when the likelihood of paternity is any less. Whether this Court agrees with that logic is not germane, especially with no constitutional challenge before it. Rather, it is enough for this Court to recognize that in Minnesota the legislature has determined that someone with a 99% or greater statistical probability of parentage enjoys a presumption not extended to those with a lower statistical probability.

There is no doubt that if a non-biological, yet presumptive father raises a child until the child believes the presumptive father to be his or her father, the child will experience substantial stress when a long absent biological father appears on the child's door steps and seeks to establish a relationship. Nevertheless, the Minnesota legislature apparently felt that there was enough benefit to be gained by allowing an alleged biological father who enjoys a 99% or greater statistical probability of being the biological father to establish a relationship, such that the benefit outweighs the harm. This thought process involves a legislative risk/benefit analysis just at the decision to grant standing to an alleged father who actually receives a child into his home involves a risk/benefit analysis. This Court is not empowered to reject or ignore either one. Accordingly, the Court will not extend the "constructive receipt" doctrine to fathers such as Plaintiff whose biological role is disputed and who do not enjoy a statistical probability of parentage of 99% or greater. In other words, the Court will not apply *Larson v. Schmidt* in order to determine whether Plaintiff accepted Molly into his home "to the extent possible under the circumstances."

Simply put, because Molly has never been received into Plaintiff's home, he does not have standing under section 257.55, subd. I (d).

ALL FACTS SET FORTH HEREIN ARE INTENDED AS FINDINGS

JTS

Minnesota Statutes

257.52 Parent and child relationship defined.

As used in sections 257.51 to 257.74, "Parent and child relationship" means the legal relationship existing between a child and the child's biological or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

257.53 Relationship not dependent on marriage.

The parent and child relationship may exist regardless of the marital status of the parents.

257.54 How parent and child relationship established.

The parent and child relationship between a child and

(a) the biological mother may be established by proof of her having given birth to the child, or under sections 257.51 to 257.74 or 257.75;

(b) the biological father may be established under sections 257.51 to 257.74 or 257.75; or

(c) an adoptive parent may be established by proof of adoption.

257.541 Custody and parenting time with children born outside of marriage.

Subdivision 1. **Mother's right to custody.** The biological mother of a child born to a mother who was not married to the child's father when the child was born and was not married to the child's father when the child was conceived has sole custody of the child until paternity has been established under sections 257.51 to 257.74, or until custody is determined in a separate proceeding under section 518.156.

Subd. 2. **Father's right to parenting time and custody.**

(a) If paternity has been acknowledged under section 257.34 and paternity has been established under sections 257.51 to 257.74, the father's rights of parenting time or custody are determined under sections 518.17 and 518.175.

(b) If paternity has not been acknowledged under section 257.34 and paternity has been established under sections 257.51 to 257.74, the biological father may petition for rights of parenting time or custody in the paternity proceeding or in a separate proceeding under section 518.156.

Subd. 3. **Father's right to parenting time and custody; recognition of paternity.** If paternity has been recognized under section 257.75, the father may petition for rights of parenting time or custody in an independent action under section 518.156. The proceeding must be treated as an initial determination of custody under section 518.17. The provisions of chapter 518 apply with respect to the granting of custody and parenting time. An action to determine custody and parenting time may be commenced pursuant to chapter 518 without an adjudication of parentage. These proceedings may not be combined with any proceeding under chapter 518B.

257.55 Presumption of paternity.

Subdivision 1. **Presumption.** A man is presumed to be the biological father of a child if:

(a) He and the child's biological mother are or have been married to each other and the child is born during the marriage, or within 280 days after the marriage is terminated by death, annulment, declaration of invalidity, dissolution, or divorce, or after a decree of legal separation is entered by a court. The presumption in this paragraph does not apply if the man has joined in a recognition of parentage recognizing another man as the biological father under section 257.75, subdivision 1a;

(b) Before the child's birth, he and the child's biological mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared void, voidable, or otherwise invalid, and,

(1) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 280 days after its termination by death, annulment, declaration of invalidity, dissolution or divorce; or

(2) if the attempted marriage is invalid without a court order, the child is born within 280 days after the termination of cohabitation;

(c) After the child's birth, he and the child's biological mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared void, voidable, or otherwise invalid, and,

(1) he has acknowledged his paternity of the child in writing filed with the state registrar of vital statistics;

(2) with his consent, he is named as the child's father on the child's birth certificate; or

(3) he is obligated to support the child under a written voluntary promise or by court order;

(d) While the child is under the age of majority, he receives the child into his home and openly holds out the child as his biological child;

(e) He and the child's biological mother acknowledge his paternity of the child in a writing signed by both of them under section 257.34 and filed with the state registrar of vital statistics. If another man is presumed under this paragraph to be the child's father, acknowledgment may be effected only with the written

consent of the presumed father or after the presumption has been rebutted;

(f) Evidence of statistical probability of paternity based on blood or genetic testing establishes the likelihood that he is the father of the child, calculated with a prior probability of no more than 0.5 (50 percent), is 99 percent or greater;

(g) He and the child's biological mother have executed a recognition of parentage in accordance with section 257.75 and another man is presumed to be the father under this subdivision;

(h) He and the child's biological mother have executed a recognition of parentage in accordance with section 257.75 and another man and the child's mother have executed a recognition of parentage in accordance with section 257.75; or

(i) He and the child's biological mother executed a recognition of parentage in accordance with section 257.75 when either or both of the signatories were less than 18 years of age.

Subd. 2. A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

257.56 Artificial insemination.

Subdivision 1. If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a-man not her husband, the husband is treated in law as if he were the biological father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The consent must be retained by the physician for at least four years after the confirmation of a pregnancy that occurs during the process of artificial insemination.

All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

Subd. 2. The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the biological father of a child thereby conceived.

257.57 Determination of father and child relationship; who may bring action; when action may be brought.

Subdivision 1. A child, the child's biological mother, or a man presumed to be the child's father under section 257.55, subdivision 1, paragraph (a), (b), or (c) may bring an action:

(a) At any time for the purpose of declaring the existence of the father and child relationship presumed under section 257.55, subdivision 1, paragraph (a), (b), or (c); or

(b) For the purpose of declaring the nonexistence of the father and child relationship presumed under section 257.55, subdivision 1, paragraph (a), (b), or (c), only if the action is brought within two years after the person bringing the action has reason to believe that the presumed father is not the father of the child, but in no event later than three years after the child's birth. However, if the presumed father was divorced from the child's mother and if, on or before the 280th day after the judgment and decree of divorce or dissolution became final, he did not know that the child was born during the marriage or within 280 days after the marriage was terminated, the action is not barred until one year after the child reaches the age of majority or one year after the presumed father knows or reasonably should have known of the birth of the child, whichever is earlier. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

Subd. 2. The child, the mother, or personal representative of the child, the public authority chargeable by law with the support

of the child, the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor may bring an action:

(1) at any time for the purpose of declaring the existence of the father and child relationship presumed under section 257.55, subdivision 1, paragraph (d), (e), (f), (g), or (h), or the nonexistence of the father and child relationship presumed under clause (d) of that subdivision;

(2) for the purpose of declaring the nonexistence of the father and child relationship presumed under section 257.55, subdivision 1, paragraph (e) or (g), only if the action is brought within six months after the person bringing the action obtains the results of blood or genetic tests that indicate that the presumed father is not the father of the child;

(3) for the purpose of declaring the nonexistence of the father and child relationship presumed under section 257.55, subdivision 1, paragraph (f), only if the action is brought within three years after the party bringing the action, or the party's attorney of record, has been provided the blood or genetic test results; or

(4) for the purpose of declaring the nonexistence of the father and child relationship presumed under section 257.75, subdivision 9, only if the action is brought by the minor signatory within six months after the minor signatory reaches the age of 18. In the case of a recognition of parentage executed by two minor signatories, the action to declare the nonexistence of the father and child relationship must be brought within six months after the youngest signatory reaches the age of 18.

Subd. 3. An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under section 257.55 may be brought by the child, the mother or personal representative of the child, public authority chargeable by law with the support of the child, the personal

representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.

Subd. 4. Regardless of its terms, an agreement, other than an agreement approved by the court in accordance with section 257.64, between an alleged or presumed father and the mother, does not bar an action under this section by the child or the public authority chargeable by law with the support of the child.

Subd. 5. If an action under this section is brought before the birth of the child, all proceedings shall be stayed after the birth, except service of process and the depositions to perpetuate testimony.

Subd. 6. If the child has been adopted, an action may not be brought.

257.58 Limitation of actions; exceptions.

Subdivision 1. **Actions for children without a presumed father.** Except as otherwise provided in section 259.52, an action to determine the existence of the father and child relationship as to a child who has no presumed father under section 257.55 is not barred until one year after the child reaches the age of majority.

Subd. 2. **Heirship.** Section 257.57 and this section do not extend the time within which a right of inheritance or a right to a succession may be asserted beyond the time provided by law relating to distribution and closing of decedents, estates or to the determination of heirship, or otherwise.

257.59 Jurisdiction; venue.

Subdivision 1. **Court jurisdiction.** The district court has jurisdiction of an action brought under sections 257.51 to 257.74. The action may be joined with an action for dissolution, annulment, legal separation, custody under chapter 518, or reciprocal enforcement of support.

Subd. 2. In addition to any other method provided by rule or statute, personal jurisdiction may be acquired by service in accordance with section 543.19.

Subd. 3. The action may be brought in the county in which the child or the defendant resides or is found or, if the defendant is deceased, in which proceedings for probate of the defendant's estate have been or could be commenced.

257.60 Parties.

The child may be made a party to the action. If the child is a minor and is made a party, a general guardian or a guardian ad litem shall be appointed by the court to represent the child. The child's mother or father may not represent the child as guardian or otherwise. The biological mother, each man presumed to be the father under section 257.55, and each man alleged to be the biological father, shall be made parties or, if not subject to the jurisdiction of the court, shall be given notice of the action in a manner prescribed by the court and shall be given an opportunity to be heard. The public agency responsible for support enforcement is joined as a party in each case in which rights are assigned under section 256.741, and in each case in which the public agency is providing services pursuant to an application for child support services. A person who may bring an action under section 257.57 may be made a party to the action. The court may align the parties. The child shall be made a party whenever:

(1) the child is a minor and the case involves a compromise under section 257.64, subdivision 1, or a lump sum payment under section 257.66, subdivision 4, in which case the commissioner of human services shall also be made a party subject to department of human services rules relating to paternity suit settlements; or

(2) the child is a minor and the action is to declare the nonexistence of the father and child relationship; or

(3) an action to declare the existence of the father and child relationship is brought by a man presumed to be the father under section 257.55, or a man who alleges to be the father, and the

mother of the child denies the existence of the father and child relationship.

United States Constitution

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of

pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

718545.1

Supreme Court, U.S.
FILED
JAN 3 2002
CLERK

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No. 01-815

In The

Supreme Court of the United States

MARY C. OVERBY and
JAMES OVERBY,

Petitioners,

v.

BENJAMIN G. WITSO,

Respondent.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF FACTS

In its decision filed June 7, 2001, the Minnesota Supreme Court affirmed the district court's and the court of appeals' determination that under Minnesota's version of the Uniform Parentage Act, respondent has standing to commence a paternity action and to request genetic paternity testing. Petitioners now ask this Court to review this decision, asserting that the court below failed to consider due process and equal protection issues.

By order dated August 27, 1999, the Hennepin County District Court determined that respondent had standing to initiate a paternity action and to request an order for genetic paternity testing to determine whether he is a presumed father under the Minnesota Parentage Act. Thereafter, petitioners requested that the district court certify the following question to the Minnesota Court of Appeals: "whether [respondent] has standing to compel blood or genetic testing."

In response to petitioners' request, the district court certified the following question as important and doubtful:

> When the biological mother admits having had intercourse with the putative father during the period of possible conception of the child at issue, the putative father acts promptly to compel blood or genetic testing, and the child is yet so young that she will not be cognizant of the testing procedure, does the putative father have standing to compel the mother and child to submit to the tests (keeping in mind that the trial court has reserved jurisdiction to appoint a guardian ad litem depending on the test results and then determine whether it is in the child's best interests that the litigation continue)?

In its decision affirming the district court's order for blood testing, the Minnesota Court of Appeals recast the certified question as follows:

> Must a paternity action be dismissed for lack of standing when the petitioning putative father shows the requisite sexual contact but has not had genetic testing, which might establish the genetic basis for standing that arises from a positive genetic test?

In sum, the *only* issue petitioners requested and had certified for appeal in the Minnesota courts, and the *only* issue that two Minnesota appellate courts considered and decided was this: whether respondent had standing to bring a paternity action and request an order for genetic testing. The certified question requested by the appellants on appeal from the district court's order compelling paternity blood testing dealt *solely* with respondent's standing to commence a paternity action and as a party thereto request an order for genetic testing. Until now, petitioners have not advanced a due process, equal protection, or other constitutional argument to any of the courts that have examined the issue of standing.

REASONS FOR DENYING THE WRIT

There is no compelling reason for the Court to review the Minnesota Supreme Court's decision in this case. The only arguable federal question presented by the Petition – whether the petitioners' and the minor child's due process and equal protection rights have been violated – has not previously been pressed by petitioners or passed on by any of the courts below. No substantial federal question is present here, and the issues presented are not ones of nationwide impact.

I. THE COURT SHOULD DENY THE WRIT BECAUSE THE QUESTIONS PETITIONERS PRESENT TO THE COURT ARE NOT FEDERAL QUESTIONS.

The first two questions presented in the petition raise purely state law issues. The first question, "Whether a man holding no presumption of paternity [under a state

paternity statute] can gain standing to compel the minor child to undergo blood or genetic testing to determine whether he is a presumed father of the minor child" raises no federal issue, and no federal statute or caselaw is offered in the petition to support an argument that a federal question is presented.

Likewise, the second question, "Whether a state can order blood or genetic testing of a minor child who is part of an intact family without first determining if such tests would be in the minor child's best interests," does not call into question any federal issue.

Petitioners' third question *purports* to raise federal constitutional issues of equal protection and due process rights, but the question points to no conflict among lower courts or to any conflict with a decision of this Court.

In their argument, Petitioners assert that the Minnesota Supreme Court's decision conflicts with decisions from other states in which a version of the Uniform Parentage Act has been enacted. However, it is distinctly within the realm of a state court to interpret its own statutes, and the states which have enacted a Parentage Act have adopted varying versions with differing language. No decision of this Court compels a state court to follow another state's caselaw when interpreting its own unique statute.

Petitioners' only citation to a decision of this Court is to the plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). The *Michael H.* case involved a constitutional challenge to a California paternity statute which provided that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is *conclusively presumed* to be a child of the marriage." 491 U.S. at 115, 109 S.Ct. at 2338 (emphasis added). In that case, the man claiming to be the biological father of a child born to a married woman challenged the constitutionality of that statute, claiming he had a liberty interest in establishing and maintaining a relationship

with his biological child that was entitled to constitutional protection.

The Minnesota legislature has not chosen to grant the marital presumption of paternity the conclusive effect that the California statute at issue in *Michael H.* provided, and as interpreted by the Minnesota Supreme Court, no Minnesota statute prohibits respondent from initiating a paternity proceeding and requesting blood tests. The *Michael H.* decision merely considered whether the California court had constitutionally interpreted and applied its own statutes. Because no similar Minnesota statute exists, because the *Michael H.* opinion was issued in the context of a challenge based on the biological father's due process rights, and because petitioners have not heretofore asserted their own due process rights, the *Michael H.* opinion carries no precedential weight in the instant matter. The Minnesota Supreme Court's decision only holds that the Minnesota Parentage Act bestows standing on respondent to commence a paternity action and request blood tests. That decision is not in conflict with *Michael H.*, and petitioners have failed to present any federal question requiring resolution by this Court.

II. PETITIONERS HAVE NEVER PRESSED, AND THE COURTS BELOW HAVE NOT PASSED ON, ANY FEDERAL CONSTITUTIONAL ISSUE.

Petitioners did not assert or brief an affirmative due process or equal protection argument to the trial court, to the Minnesota Court of Appeals or to the Minnesota Supreme Court. Where no federal constitutional issue was pressed or passed on by the state court, this Court should decline to hear the case. *See Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, L.Ed.2d 527 (1983).

Petitioners did not raise any affirmative due process, equal protection, or other constitutional arguments in their submissions to the district court or to the state appellate courts. To the extent that petitioners argued any

constitutional issues at all. Their arguments consisted of responses against constitutional issues they anticipated respondent might make on his own behalf (and which he did not, in fact, raise). Petitioners did not brief any affirmative constitutional arguments and did not argue any constitutional issues at oral argument before the Minnesota Supreme Court. There has been no real contest at any stage of this proceeding upon the point. The Minnesota Supreme Court's decision does not discuss the merits of any constitutional issue. The decision is merely a state court's interpretation of whether respondent has standing to commence a proceeding under a state paternity statute.

"Due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there." *Id. (quoting McGoldrick v. Compangnie Generale*, 309 U.S. 430, 435-436, 60 S.Ct. 670, 673, 84 L.Ed. 849 (1940)).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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